



Osman v Jubilee Party & 3 others (Complaint E007 (NRB 'A') of 2023) [2023] KEPPDT 1359 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEPPDT 1359 (KLR)

**REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT E007 (NRB 'A') OF 2023
D. NUNGO, CHAIR, S MUSAU & T. CHEPKWONY, MEMBERS
MAY 19, 2023**

BETWEEN

HASSAN ADEN OSMAN COMPLAINANT

AND

JUBILEE PARTY 1ST RESPONDENT

HIS EXCELLENCY HON UHURU KENYATTA 2ND RESPONDENT

HON JEREMIAH KIONI 3RD RESPONDENT

KAGWE GICHOHI 4TH RESPONDENT

RULING

Introduction

1. The instant Complaint was filed on 8th May 2023 together with the Claimant’s List of Witnesses and Witness Statement, the Claimant’s List & Bundle of Documents, and a Notice of Motion Application dated 8th May 2023 filed under certificate of urgency (hereinafter referred to as the application).
2. The matter was placed before the tribunal on the same date when the application was certified as urgent and directions issued for service and for inter partes hearing of the application on the 15th May 2023.
3. On the 15th May 2023 when the application came up for hearing, the Complainant was represented by Mr. Lakicha Advocate. Two lawyers from different law firms, namely, Mr. Awele from Awele Jackson Advocates LLP and Mr. Njomo from Kamotho Njomo & Company Advocates appeared before the tribunal both claiming instructions to represent the 1st Respondent. The 2nd, 3rd and 4th Respondents were represented by Mr. Awele. Both law firms had filed preliminary objections (POs) to the complaint.
4. Considering the POs, the contest on representation of the 1st Respondent and the urgency of the application, the Tribunal issued directions to parties to file all their affidavits on the preliminary



objections, the contest on representation and the application, and that oral submissions be made on all the issues on 17th May 2023, where-after the tribunal would isolate the issues and analyse and determine them in order of priority starting with the jurisdictional and representation issues.

The Application

5. The application seeks the following orders:-
 - i. Spent
 - ii. That pending the hearing and determination of the application herein, this Honourable Tribunal do grant temporary orders and/or restraining and conservatory orders restraining the Respondents either by themselves, their agents servants and employees or any other person of any member of the Jubilee Party from convening any meeting of the Special Delegates Convention on 22nd May 2023 or any other day and/or dealing, acting or undertaking in any way and/or discussing and/or effecting any changes in the National Executive Committee.
 - iii. That pending the receipt of the information/documents requested for by the Claimant from the Office of the Registrar of Political Parties under Article 35 of the Constitution vide letter dated 4th May 2023, this Honourable court do grant restraining and conservatory orders restraining the Respondents either by themselves, their agents, servants, employees, or any other person or any member of the Jubilee Party from convening any meeting of the Special Delegates Convention on 22nd May 2023 or any other day and/or dealing, acting or undertaking in any way and/or discussing and/or effecting any changes in the National Executive Committee.
 - iv. That this Honourable Tribunal do order the Registrar of Political Parties not to effect any changes emanating from any Special Delegates Convention of the Jubilee Party.
 - v. That costs of this application be provided for.
6. It is supported by the Affidavit sworn by Hassan Aden Osman on 8th May 2023 where the Applicant avers as follows:-
 - i. That the Respondents have purported to call for a National Special Delegates Convention set for 22nd May 2023 by inviting various members of the party to the detriment of the Claimant and members of Jubilee Party.
 - ii. The National Executive Committee (NEC) of the Jubilee Party is divided into two factions, where one is led by the 2nd, 3rd and 4th Respondents, while the other faction is led by Honourable Sabina Chege and Hon. Kanini Kega.
 - iii. That the Claimant vide his letter dated 4th May 2023 wrote to the Registrar of Political Parties who have a role to verify and make publicly available the list of all members of political parties
 - iv. That the Respondents have tried to purport to remove or change the party constitution party membership and leadership when the same is unlawful, illegal, and unprocedural.
 - v. That the actions by the Respondents are *ultra vires* to the party constitution, the Constitution of Kenya 2010 and the Political Parties Act, 2011 (the PPA).
 - vi. That no NEC was ever held or constituted at all as purported by the Respondents and proposals thereafter constitute procedural impropriety and are at best illegal, null and void *ab initio*.



- vii. That the conduct of the Respondents unequivocally demonstrate the desire to serve personal interests and not to serve members of Jubilee Party with humility, dignity and respect. and is abusing the powers given to them by the members.
 - viii. That the tribunal had directed that all party's disputes be resolved through the party's internal dispute resolution mechanism (IDRM) which to date has not been carried out.
 - ix. That the branch offices of Jubilee Party are not currently functional where all the party's documents are supposed to be kept and therefore the Claimant's fear is that the delegates from the branches might not attend the called special NDC and they may end up with strangers participating in the convention.
 - x. That the party headquarters were shifted from Thika Road to a residential gated community in Kileleshwa where the members of the party cannot easily access.
 - xi. That the party stands to suffer irreparable loss and damage unless the Respondents are restrained from continuing with the ongoing illegal actions of acting, conducting and dealing on behalf of the Jubilee Party.
7. The Application is further supported by Further Affidavits sworn by the Applicant in response to the Affidavit by Nelson Dzuya and Jeremiah Kioni. He has deposed that he is a bona fide member of Jubilee Party as demonstrated by the letter dated 10th May 2023 from the Registrar of Political Parties, the Jubilee Party List of Members of Parliament dated 28th July 2022 submitted to the Independent Electoral and Boundaries Commission (IEBC), and his party membership certificate and membership card. He avers that Jubilee party NEC is divided and in wrangles and have failed to conduct the affairs of the party as required as demonstrated by various documents that he has annexed. According to him, this tribunal has jurisdiction to hear and determine this matter as the party mechanism has failed, neglected or refused to urgently deal and or address the dispute relating to the illegal and unlawful notices for the Special NDC scheduled for 22nd May 2023 and/or to deal with the current turmoil within the party. The operations and activity of the party IDRM have in any event been greatly affected since there are varying appointments of its members done by two factions and thus it cannot efficiently carry its mandate.
8. The Applicant relied on his List and Bundle of Authorities dated 17th May 2023 and took the Tribunal through various authorities including *Stephen Osura Ochieng & 2 Others v. ODM & 2 Others* (2011) eKLR; *Dipack Lalchand Lichani v. Kenya revenue Authority & Anor* (2021) eKLR; *Lydia Mathis v. LAisula Lesuuda & 2 Others*; *United Democratic Movement & 25 Others v. PPDT* (2021) eKLR; and *Wyclife Oyodi Okeo & 2 Others v. Hon. Musalia Mudavadi*.

Response to the Application by Kamotho Njomo & Company Advocates

9. In response to the application, the firm of Kamotho Njomo & Company Advocates filed a Notice of Appointment of Advocates and Notice of Preliminary Objection dated 15th May 2023 on behalf of the 1st Respondent. The PO is raised on the ground that this Honourable Tribunal lacks jurisdiction to hear this matter as the Claimant is required to first exhaust the dispute resolution mechanism provided for under the Jubilee Party Constitution pursuant to Section 40 (2) of the *Political Parties Act*. It is submitted that the applicant disregarded this cardinal requirement of IDRM prior to moving the tribunal and where there is no IDRM, the tribunal lacks jurisdiction.
10. On the contested question of representation, the firm of Kamotho Njomo & Company Advocates relied on their Affidavit on Representation sworn by Hon. Kanini Kega on 15th May 2023. He avers



that he is the Ag SG of the 1st Respondent pursuant to NEC resolutions on the meeting held on 10th February 2023, and that he issued instructions to the firm of Kamotho Njomo & Company Advocates to enter appearance on behalf of the 1st Respondent in his capacity as the SG of the party. According to Hon. Kanini Kega, the 3rd Respondent is not the party SG as he was suspended and his attempts to invalidate his suspension was subject of proceedings before the Tribunal in PPDT E001 of 2023. The tribunal in its Judgment delivered on 19th April 2023 did not invalidate the suspension but referred the matter to IDR. IDR was commenced and the same is pending determination. Accordingly, any action by the 3rd Respondent purporting to discharge the functions of SG is of no legal effect.

11. The firm of Kamotho Njomo & Company Advocates have in addition filed Replying Affidavit sworn by Nelson Dzuya on 15th May 2023 in response to the application. It is submitted that NEC is the executive body of the NDC and its function is to inter alia ensure that all decisions made by all party organs are duly carried out and all policies adhered to. As regards convening NDC, NEC has the function to ensure timely preparation of the agenda and reports of NDC.
12. Nelson Dzuya, in his Replying Affidavit, deposed that it had come to his attention that the 2nd Respondent issued notices dated 27th April 2023 purporting to call for a NEC meeting on 28th April 2023. The meeting was held on 28th April 2023 and among the resolutions passed was that the party would hold an NDC meeting on 22nd May 2023. A notice for special NDC to be held on 22nd May 2023 was published in the print media on 29th April 2023 and during a NEC meeting of 2nd May 2023, an urgent agenda was proposed and adopted to deliberate on the issue of the purported notice to convene NEC meeting on 28th April 2023 and notice of NDC published in print media on 29th April 2023. He chaired the meeting and the following resolutions were passed:-
 - i. The notice dated 27th April 2023 for NEC meeting held on 28th April 2023 was irregular as it did not comply with the requisite 7 days' notice period and was also not issued by the SG pursuant to Article 8.2(5) of the party constitution.
 - ii. That while the party leader has the power to summon a meeting of the NDC as provided for under Article 10.1 of the party constitution, the issuance of a notice of the NDC is a function of the SG after a decision of NEC as provided for under Article 8.2(5).
 - iii. The purported NEC meeting lacked the requisite quorum as purported under Article 23 of the party constitution which provides that quorum shall be a third of all members eligible to attend.
 - iii. The meeting was irregular as it was attended by persons who are not eligible NEC members and also NEC members who have been suspended pending internal party disputes resolution process that is ongoing.
13. He further avers that the office of the Registrar of Political Parties (ORPP) communicated to them vide letter of 8th May 2023 informing them of resolutions of the meeting of 28th April 2023 and the documents that had been forwarded to ORPP in respect thereto for their response and any other action. They responded vide letter of 15th May 2023 reiterating that the meeting of 28th April 2023 was irregular and of no legal consequence and that all the matters arising from the meeting held on 28th April 2023 had been referred to IDR.
14. It is further submitted that following resolution of NEC of 2nd May 2023 referring the issue of the notice convening special NDC published on 29th April 2023, Mr. Nelson Dzuya lodged a complaint with the party's IDRC on 11th May 2023 and the IDRC wrote to the party leader on 12th May 2023 notifying him of the said dispute.



Response to the application by Awele Jackson Advocates LLP

15. In response to the application, the 1st to 4th Respondents through the firm of Awele Jackson Advocate LLP filed a Notice of Appointment dated 12th May 2015 filed on the same date at 17:19:13. The said law firm in addition filed a Notice of Preliminary Objection dated 12th May 2023 on the grounds, inter-alia, that:-
- i. Pursuant to Section 40(2) of the *Political Parties Act*, No. 11 of 2011 Laws of Kenya, Section 9(2) of the *Fair Administrative Actions Act* and Article 16(B) of the Jubilee Party Constitution, the matters in dispute in the complaint have not been subjected to the internal dispute resolution mechanisms of the Jubilee Party.
 - ii. The complainant is not a bona fide member of the Jubilee Party and is accordingly without locus standi to file these proceedings.
 - iii. In the event, this tribunal has no jurisdiction over this matter in the first instance.
16. In urging their preliminary objection (PO), the Respondents maintain that the tribunal has no jurisdiction to hear and determine this dispute under Section 40(2) of the *PPA*, Section 9(2) of the *Fair Administrative Action Act* (the FAA) and Article 16(B) of the Jubilee Party Constitution as the dispute herein has not been subjected to the party's internal dispute resolution mechanism (IDRM). That the Applicant has filed a similar complaint against the same parties with the party's internal dispute resolution committee (IDRC) and the same is pending consideration in accordance with the IDRC Rules and that these proceedings are therefore premature and in flagrant abuse of process and should be struck out.
17. The Respondents also relied on their Replying Affidavit sworn by Jeremiah Kioni on 15th May 2023 and a Supplementary Affidavit sworn by Jeremiah Kioni on 16th May 2023. It is the 3rd Respondent's submission that in line with the Gazette Notice issued by the Office of the Registrar of Political Parties, he remains the legitimate Secretary General (SG) of the 1st Respondent, and that he has the exclusive mandate under Article 10.5 of 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. That in line with the party Constitution, he instructed the firm of Awele Jackson Advocates LLP vide his letter dated 12th May 2023 to represent the 1st Respondent in this matter and that the Notice of Preliminary Objection and Replying Affidavit filed by the said law firm were accordingly filed under his authority. The purported representation of the 1st Respondent by the firm of Kamotho & Njomo Advocates ought to be disregarded and the documents filed by the said firm struck out.
18. The Respondents submit that to the extent that the Applicant submits that his application is grounded on the fact that there exist two factions of Jubilee party NEC, the same is a gross misapprehension, and the application is without basis in the party constitution, the law or at all. The averments by the Applicant that there exist two NEC factions cannot be the basis upon which this Tribunal can be called upon to stop a duly convened party NDC, or issue any legally binding orders or directions to the benefit of a party unless and until the Tribunal after a full hearing and presentation of evidence is satisfied of its legal import. Granting orders on loose and flimsy grounds would set a dangerous precedent and be a recipe for chaos and disorganization in political parties as nothing would be easier than for a mischievous member of a political party to merely initiate bare allegations against lawfully appointed and elected officials on the basis of which they would then seek legitimacy as a faction.
19. Under the Jubilee Party Constitution, there is only one Party Leader, Chairman, SG, or such other office established therein and the procedure for appointment, election removal and suspension of party



officials is also set out in the party constitution. The Applicant has not pointed out the provisions of the party constitution under which Hon. Sabina Chege or Hon. Kanini Kega allegedly ascended to office as leaders of a faction of jubilee party officials. The Applicant has further not demonstrated any breach of the party constitution to warrant the conclusion that the Special NDC was unlawfully called.

20. The Respondents maintain that they are the bona fide officials of Jubilee Party and have been acting as such with the mandate of the NDC. The assertion that NEC of jubilee is led by a faction that is led by Hon. Sabina Chege and Hon. Kanini Kega is a contested factual assertion that must be established by evidence at the substantive hearing of the Complaint.
21. It is the Respondents further submission that the Applicant's fear that NDC will be attended by strangers is speculative and cannot be basis for grant of interim orders to stop the meeting. On a balance of convenience, greater damage and harm will be occasioned on the larger membership of the party in granting orders sought than denying them. In any event, the Tribunal can remedy illegality if at all its shown by cogent evidence that the NDC was unlawfully convened.

Issues, Analysis and Determination

22. Flowing from the application and the affidavits filed by the parties hereto and their oral submissions, we have isolated the following issues for determination:-
 - i. Whether the Tribunal has Jurisdiction to hear and determine this matter. ii. Which law firm is properly on record for the 1st Respondent
 - iii. Whether the application seeking orders to, *inter alia*, stop the Special NDC scheduled for 22nd May 2023 is merited?
 - iii. What are the appropriate reliefs to grant.

Whether the Tribunal has Jurisdiction to hear and determine this matter.

23. In undertaking our analysis and determination of the objection to our jurisdiction, we are guided by the well settled principle that once a court's jurisdiction is objected to by a party to the proceedings, such an objection must be dealt with as a preliminary issue, before determining the case on merits (Refer to Supreme Court decision in [Aviation & Allied Workers Union Kenya v Kenya Airways & Others](#)). Jurisdiction is the first hurdle that a Court or tribunal will cross before it embarks on its decision-making function. It is primordial in every suit and has to be there when the suit is filed in the first place. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied (Refer to these cases [Joseph Njuguna Mwaura & 2 others v Republic](#) ; [Phoenix of EA Assurance Company Limited v S M Thiga t/ a Newspaper Service](#)).
24. 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 1st Respondent's representation, we must satisfy ourselves that we are possessed of the jurisdiction empowering us to do so.
25. The Tribunal derives its jurisdiction from Article 169 (1) (d) of the [Constitution of Kenya](#) 2010, as read together with Section 40 of the [Political Parties Act](#), 2011 (the PPA). Section 40 of the [PPA](#) 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.
26. The instant Complaint is between members of a political party and a political party and it not in dispute that it falls under Section 40(1)(a) and (b) of the PPA. Section 40(2) of the PPA requires that the Complainant adduces evidence of an attempt to subject the dispute to the 1st Respondent’s IDRMs prior to moving the Tribunal. This is akin to the doctrine of exhaustion of remedies which is now of esteemed juridical lineage in Kenya.
27. In the case of Speaker of National Assembly v Karume, the Court of Appeal held that
- “where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
28. Many court decisions have provided justification and rationale for the doctrine of exhaustion under the 2010 Constitution. In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, the Court stated that: -
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...These accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”
29. The High Court In the Matter of the Mui Coal Basin Local Community stated the rationale for the doctrine of exhaustion follows: -
- “The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J B. Ojwang’ has felicitously called an



“Ascendant Judiciary.” The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

30. The following excerpts from the Supreme Court decision in United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 Others are also worth reproducing: -

- (22) In response, the 1st respondent, filed a preliminary objection challenging the High Court’s jurisdiction to entertain the judicial review proceedings pursuant to Sections 11 and 14A (4) of the Standards Act and Section 9 of the FAA Act. The Court (Mativo J) delineated two issues for determination in considering the preliminary objection: whether it was divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism; and whether the ex parte applicant had demonstrated any grounds to warrant grant of judicial review orders.
- (23) On the first issue, the trial court found that the ex-parte applicant ought to have exhausted available dispute resolution mechanism before approaching it. The learned Judge therefore found that the judicial review application offended the doctrine of exhaustion of statutorily available remedies set out under Sections 11 and 14A (4) of the Standards Act and Section 9 (2) of the FAA Act, and further failed to satisfy the exceptional circumstances under section 9(4) of the FAA Act. It thus held that the application must fail. The court however did not down its tools upon making the determination that it lacked jurisdiction. It determined the second issue and found that the ex-parte applicant had failed to establish a case to warrant grant of judicial review orders.
- (24) On appeal, the Court of Appeal delimited three issues for determination, namely: whether the High Court properly exercised its jurisdiction, whether it was right in invoking the principle of exhaustion, and whether it was right in finding that the substantive motion failed the threshold for grant of the judicial review. The Appellate Court upheld the trial court’s determination and entirely endorsed its reasoning. It found that the trial court in reaching its determination was guided by the need to serve substantive justice to the parties and exercised its discretion soundly and on reasonable judicial principles. The Court of Appeal opined that having failed to revert to the internal dispute resolution mechanisms provided for under Section 14A (4) of the Standards Act and Section 9 (2) of the FAA Act and having also failed to apply for exemption from this requirement as is provided for under Section 9 (4) of the FAA Act, the High Court was divested of jurisdiction to entertain the judicial review proceedings. The Court of appeal also found that having reached this conclusion on jurisdiction, the High Court ought to have downed its tools. Nonetheless, it considered the third issue and agreed with the trial court that the substantive motion failed to satisfy the grounds for grant of judicial review.
- (25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of the Constitution. From the foregoing, we find no difficulty in concluding that the issues before the High Court as well as the Court of Appeal did not either involve the interpretation and application of the Constitution or take a trajectory of Constitutional



interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

- (26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasijudicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance..."
31. The above passages warrant no amplification. Under Article 163(7) of the Constitution, there is no gainsaying that the binding nature of the Supreme Court decisions is absolute. It is not open to any other court or the tribunal to examine the same with a view to arriving at a different decision. The above Supreme Court decision conclusively settled the law. Where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the Constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance unless in exceptional circumstances.
32. Turning to the instant case, the Tribunal has to scrutinize whether it has been demonstrated that there was an attempt made by the Applicant to subject the dispute to the 1st Respondent's IDRМ.
33. In the case of Jeconia Okungu Ogutu & another v Orange Democratic Movement Party & 5 others, the Court stated;
- “Where there has been an attempt to refer to the IDRМ, this Tribunal becomes well seized of the matter.”
34. The Tribunal in the case of *Ibrahim Abdi Ali v Mohamed Abdi Farah & Another* held that:
- “Where a party can show that he made honest attempts at resolving the dispute with the party but the party's process was not satisfactory for such reasons as delay, the individual cannot be faulted for moving to the Tribunal even where his party has not concluded a hearing and a determination of his matter...”
35. This tribunal has considered what amounts to an attempt at IDRМ in various cases. In the case of John Mworia Nchebere & Others v 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 IDRМ 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.”

36. We have perused the 1st Respondent’s Constitution and we note that Article 16B thereof establishes the party’s Internal Dispute Resolution Committee (IDRC) with the mandate to hear and determine all party disputes other than disputes arising from party nominations and elections and party discipline. The IDRC has rules that govern its procedures and affairs. This in our understanding is the IDRDM body that ought to deal with the dispute relating to the special NDC subject hereof.

37. We have evaluated the evidence furnished to establish whether the complainant made any attempt to resolve this matter within the party’s stated IDRDM (IDRC) in the first instance. We note that there is nowhere the Applicant avers in his pleading and/or demonstrates that he made any attempts to subject the instant dispute to IDRDM. No correspondence or complaint has been produced by the Applicant in that regard. The only correspondence produced emanating from the Applicant herein is a letter from his lawyer dated 4th May 2023 addressed to the Registrar of Political Parties. The subject letter is a demand for specified information under Article 24 and 35 of the *Constitution of Kenya* and Section 4 of the *Access to Information Act* No. 31 of 2016.

The same is not copied to the party. Interestingly, it is copied to the Commission on Administrative Justice, The Kenya National Commission of Human Rights, and the National Cohesion & Integration Commission. We note that the Registrar of Political Party responded to the Applicant’s letter vide a letter dated 10th May 2023 and referred the Applicant to the party Chairman to facilitate the request. There is no evidence that the Applicant followed up on the matter.

38. The Applicant has submitted that he could not process the dispute under the party’s IDRDM in the first instance. According to him, the party mechanism has failed, and that the party has neglected or refused to urgently deal and or address the dispute relating to the illegal and unlawful notices for the Special NDC scheduled for 22nd May 2023 and/or to deal with the current turmoil within the party. He avers that the operations and activity of the party IDRDM have in any event been greatly affected since there are varying appointments of its members done by two factions and thus it cannot efficiently carry its mandate. It is therefore his submission that the exceptional circumstances within the party should enable this tribunal to assume jurisdiction to hear and determine this matter.

39. From the decided cases, while, exceptions to the exhaustion requirement are not clearly delineated, Courts or tribunals must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved to determine whether an exception applies. The Court may, in



exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the Constitution law and permit the suit to proceed before it.

40. Do the foregoing circumstances alluded to by the Applicant amount to exceptional circumstances that warrant this tribunal to exempt the Applicant from IDRM? We note that whereas the Applicant avers that the party mechanism has failed and/or that the party has neglected or refused to urgently deal and or address the dispute relating to the illegal and unlawful notices for the Special NDC scheduled for 22nd May 2023 and/or to deal with the current turmoil within the party, the Applicant, as we have already observed, did not produced any correspondence or complaint demonstrative that he registered any protest or complaint with the party regarding the upcoming Special NDC. It is not enough to fault IDRM without demonstrating any attempt in the first instance.
41. We note that the Respondents at paragraph 6 of the Replying Affidavit sworn by Hon. Jeremiah Kioni alluded to the fact that the Applicant had filed a similar complaint before the party's IDRM (IDRC). To this end, they have produced document marked as exhibit B, a Notification of Dispute dated 12th May 2013 in respect of IDRC Dispute No. 4 of 2023 addressed to His Excellency Hon. Uhuru Kenyatta, C.G.H. From the document, the complainant is disclosed as one Nelson Dzuya, and not the Applicant herein. It is therefore not true that the Applicant filed complaint before IDRM. We have further perused the Dispute Form dated 11th May 2023 in respect to the said IDRC Dispute No. 4 of 2023 annexed to the Affidavit sworn by Nelson Dzuya and we note that even if it were to be considered that the subject of that dispute is the special NDC also subject hereof, the Dispute Form shows that the dispute before IDRC was lodged on 11th May 2023 after this complaint was filed. In essence, the position remains that this complaint was filed before attempting IDRM and is premature.
42. We have further considered the Applicant's contention that the operations and activity of the party IDRM have greatly been affected since there are varying appointments of its members done by two factions and thus it cannot efficiently carry its mandate. To demonstrate this contention, the Applicant relied on exhibit marked as HAO4. We have perused the documents marked as exhibit HAO4 and we note that they relate to minutes of what seems to be a contested NEC meeting of 28th April 2023 and directions in certain disciplinary cases before the party's Disciplinary Committee (DC). From the party's constitution, the DC is different from IDRC and their different mandates are clearly stipulated. As we have already stated above, the instant dispute falls within the mandate of the IDRC. The Applicant did not file any complaint with the IDRC and he has indeed not furnished any evidence of the party's appointment of different IDRCs to deal with the dispute subject hereof.
43. The Applicant relied on the case of *Stephen Asura Ochieng & 2 Others v. ODM & 2 Others*, amongst others, in an attempt to persuade the tribunal that it can assume jurisdiction where the party frustrates IDRM. In the subject cases relied on by the Applicant, it is evident that the Complainants therein had either written a letter to the party or lodged a complaint with the party in the first instance, and that it is the party that failed to respond to and/or attend to the same. This is not the position in this case and the judicial authorities are therefore distinguishable.
44. In PPDT Complaint No. E104 of 2022 *Qureysbi Khalif Ali v. Jubilee Party & IEBC*, this Tribunal stated as follows at paragraphs 23 to 26 thereof: -

“ 23. In essence, a party that has not attempted IDRM should demonstrate that any of the circumstances listed above exist as a bar thereto.

24. In this instant case we have evaluated the pleadings and evidence adduced and we note that the Complainant has not demonstrated any attempt at IDRM. Counsel for the Complainant in fact admitted during his oral submissions that



no document had been annexed to demonstrate an attempt at IDR. This in our opinion expressly offends the provisions of Section 40(2) of the *PPA*.

24. Further, none of the circumstances highlighted in the John Mworira Nchebere case have been demonstrated to exist in this case to allow us to assume jurisdiction nevertheless. 26. Contrary to the Complainant's submission, Article 16 of the 1st Respondent's Constitution establishes the National Elections Appeals Tribunal which is expressly mandated under Article 16(4) to hear and determine disputes arising from party nominations and elections. We therefore do not agree with the Complainant's assertion that the party has no IDR mechanism to resolve party list disputes which fall within the category of party nomination disputes. We also do not agree with the Complainant's assertion that an attempt at IDR would be a futile exercise in light of the limited timelines. In our opinion, the limited timelines do not justify a blatant breach of Section 40(2) of the *PPA*....”

45. And in a recent decision of this tribunal in PPDT Nairobi Complaint No. E003 of 2023 *Fatuma Adan Dullo & Jubilee Party v. Azimio la Umoja One Kenya Coalition Party & 3 Others*, we observed as follows:-

“ 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 IDR envisioned under the Respondent's coalition agreement does not in fact exist... In essence, the Complainants cite lack of a dispute resolution organ as the main reason for not pursuing IDR.

44. However, as demonstrated by case law, the burden first rests with the Complainants to demonstrate that they have made an honest attempt at IDR. We have considered the definition of an attempt at IDR 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 dispute or attempted to resolve the dispute within the coalition agreement.... ”

46. Taking into consideration the foregoing, we are not persuaded that the Applicant has demonstrated exceptional circumstances that exempt him from the statutory obligation to pursue IDR prior to moving this tribunal. We therefore find that there was no honest attempt at IDR.



47. In *Amani National Congress Party v Godfrey Osotsi & another* [2021] eKLR, Mbogholi Msagha, J. 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. Having found that there was no honest attempt at IDRM, it is our view that the present Complaint and Application is premature and the Tribunal lacks jurisdiction to hear and determine the same.

What are the appropriate reliefs to grant?

49. As we have already stated, jurisdiction is sacrosanct when it comes to the powers that a court or tribunal may have to continue proceedings or examine the merits of a case. Courts have emphasized time and time again that jurisdiction is everything and without it a court or tribunal has no basis for continuation of proceedings. It is worth citing the dictum on this point as enunciated in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has not power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings”

50. Guided by the dictum in the foregoing case, and having determined that we have no jurisdiction, it follows that delving into the question of the 1st Respondent’s representation and the merits of the application 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 preliminary objections filed by the Respondents are upheld.
- ii. That the Complaint and Application herein be and is hereby struck out.
- iii. Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023.

DESMA NUNGO -CHAIRPERSON

STEPHEN MUSAU - MEMBER

THERESA CHEPKWONY - MEMBER

