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## **The Law and Emerging Jurisprudence on the Jurisdiction of Political Parties Dispute Tribunal (PPDT) of Kenya**

**By: Wilfred Akhonya Mutubwa\***

**&**

**Rosemary Kamathi\***

### **Abstract**

*The article is a reflection on the evolution of the pre-election dispute resolution jurisdiction of the Political Parties Disputes Tribunal (PPDT) in the last decade from 2011 to 2021. It reviews the challenges, prospects and problems that have faced the PPDT over the year as it grew from a five (5) member body to the twenty-five (25) member quasi-judicial body it is today. The efforts by the Tribunal and the Courts to carve and demarcate its mandate and jurisdiction are reflected upon as well as the legislative interventions that appear to come up in every election season to expand the jurisdiction as well as the membership of the Tribunal. The wisdom of engaging and training eighteen (18) ad-hoc members who become functus officio after one year is put to question. It is recommended that the Parliament considers enacting a separate Act that addresses itself on the PPDT mandate including its establishment, composition, duties, jurisdiction and its powers. Relatedly, there is concluded that there is need to review of policy and legislative reform related to elections to create enabling legal and policy framework for effective electoral dispute resolution (EDR).*

### **1.0 Introduction**

In every democracy, electoral disputes resolution is a necessity for purposes of appealing and reviewing electoral actions or procedures to uphold the integrity of the electoral process and manage election conflicts.

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\* *Adjunct Lecturer MKU School of Law, Advocate and Vice Chairperson Political Parties Disputes Tribunal.*

\* *Lecturer, and Head of Department – Public law, MKU School of Law.*

The effectiveness of Electoral Dispute Resolution (EDR) is a key determinant of the extent to which elections are considered free, fair, peaceful and credible.”<sup>1</sup> In this regard, resolution of electoral disputes take three approaches, namely, internal dispute resolution mechanisms by political institutions, appeals to the judicial and quasi-judicial system and alternative systems of resolution of electoral disputes depending on the stages in the electoral cycle that it occurs as elections are not a single event but myriad events and process. In other words, EDR processes take the form of judicial, administrative and alternative dispute resolution<sup>2</sup> but the common thread is the need to ensure the efficient protection and effective enforcement of the political rights to elect or to be elected and uphold the will of the voters.<sup>3</sup>

There is emerging shift of EDR from focus on judicial consideration towards embracing quasi-judicial administrative and alternative mechanisms owing to the realization that election disputes occur at different stages of the election process and the resolution of disputes before the actual election have huge potential to impact the overall character of the election as well as the disputes that eventually end up becoming election petitions. This is what the approach taken by Judiciary of Kenya starting in 2012 in addressing potential election disputes backlog in placing emphasis on effective handling of pre-election disputes in order to alleviate subsequent litigation via election petitions.<sup>4</sup>

## **2.0 The Origins and Mandate of the Political Parties Disputes Tribunal**

The origins of the PPDT trace back to the aftermath of the 2007/8 post-election violence (PEV) which revealed that unresolved tension in the

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<sup>1</sup> The Judiciary Working Committee on Election Preparations, “Pre-election Dispute Management: Between Judicial and Administrative Dispute Management Mechanisms,” (September 2012), < <http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>> (accessed on 17 April 2022).

<sup>2</sup> *Ibid.*

<sup>3</sup> ACE Electoral Knowledge Network, “Electoral Dispute Resolution,” (ACE, 2012), Available at: <https://aceproject.org/ace-en/topics/lf/lfb12/lfb12a/default> (accessed on 17 April 2022).

<sup>4</sup> The Judiciary Working Committee on Election Preparations, *Ibid.*

electioneering period could trigger violence in the post-election period. The Independent Review Committee (Kriegler Commission) established to review electoral environment in Kenya<sup>5</sup> recommended in its final report “the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial stages of dispute resolution by the ECK.”<sup>6</sup>

In turn, the promulgation of the Constitution of Kenya entrenched the political rights of every citizen to make political choices including the right to form a political party and to participate in the activities the political party and to vie and be elected to any office of the political party.<sup>7</sup> Where the actions of a political party or a party official infringes or threatens one’s political rights, they are entitled to seek redress from the party through its internal dispute resolution mechanism, engage the IEBC for resolution of the dispute or lodge their dispute with the Political Parties Disputes Tribunal (PPDT).

The mandate to handle pre-election dispute in Kenya is established and vested by the Constitution and by statute under Article 87 of the Constitution on the political parties’ internal disputes resolutions mechanisms (IDRMs), the Independent Electoral and Boundaries Commission (IEBC) and the Political Parties Disputes Tribunal (PPDT).<sup>8</sup> While the resolution of electoral disputes touching on political parties is mainly the mandate of the Political Parties Disputes Tribunal (PPDT), other mechanisms such as IEBC Dispute Resolution Committee enjoy concurrent jurisdiction in some aspects. The PPDT is established under section 39 of the Political Parties Act, 2011 with a mandate to fairly and expeditiously resolve disputes arising from

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<sup>5</sup> The Elephant, ‘Summary of the Kriegler Commission Report 2007 Election Report.’ (2018) <<https://www.theelephant.info/wp-content/uploads/2018/04/Elephant-Kriegler-Table.pdf>> accessed on 29 March 2022.

<sup>6</sup> IREC, “Kriegler Commission Report Summarized Version,” Available at: <[https://www.kas.de/c/document\\_library/get\\_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038)> accessed on 29 March 2022.

<sup>7</sup> Article 38(1) and (2) of the Constitution of Kenya, 2010.

<sup>8</sup> ICJ Kenya, *Ibid.*

political parties' activities.<sup>9</sup> It is an independent tribunal envisioned under Articles 87 (1) of the Constitution which enjoins Parliament to “establish mechanisms for timely settling of electoral disputes” and 169 (1) (d) of the Constitution which makes provision for Tribunals in the justice system ranking as subordinate court.<sup>10</sup> Currently, out of a total of more than 50 Tribunals in Kenya, the PPDT is one of the about two (2) dozen tribunals that have transited to be under the Judicial Service Commission as envisaged under the Constitution.<sup>11</sup>

Previously, section 40(2) of the Political Parties Act, 2011 provided that PPDT shall not hear or determine any dispute except appeals from the decisions of registrar of political parties unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms. Effectively, this introduced the requirement to exhaust the political parties internal dispute resolution mechanism until the Political Parties Act (Amendment), 2016 expanded the jurisdiction of the PPDT to include handling disputes touching on political parties' primaries. However, this amendment omitted to include the requirement that such disputes exhaust the IDRMs necessitating the recent amendment which introduced section 38B of the Political Parties (Amendment) Act, 2022 to entrench the jurisdiction of political parties internal disputes resolution mechanism (IDRMs) with regard to party nominations.<sup>12</sup> The political party IDRMs is required to resolve any dispute arising out of the party nominations within thirty days after the date of the party nominations after which appeals lie at the PPDT. However, a

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<sup>9</sup> Electoral Institute of Sustainable Democracy in Africa, 'Kenya: Political Parties Disputes Tribunal,' African Democracy Encyclopedia Project < <https://www.eisa.org/wep/kentribunal.htm>> accessed on 29 March 2022.

<sup>10</sup> The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Political Parties Disputes, 'Policy Brief: Stakeholders' Evaluation Report on the Performance of the PPDT in the 2017 Party Nominations,' (PPDT, 2019) < [https://icj-kenya.org/?smd\\_process\\_download=1&download\\_id=5102](https://icj-kenya.org/?smd_process_download=1&download_id=5102)> accessed on 29 March 2022.

<sup>11</sup> The Judiciary, 'Know Your Tribunals,' (Kenya Law, 2022) < <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/RevisedKnowYourTribunalsAdvert.pdf>> accessed on 29 March 2022.

<sup>12</sup> Section 38(1)(a) of the Political Parties (Amendment) Act, 2022.

party just needs to show evidence of having engaged the IDR and need not have exhausted to refer a dispute to PPDT.<sup>13</sup>

### **3.0 The Political Parties Dispute Tribunal as a Quasi-Judicial Body**

Article 1(3) (c) of the Constitution recognizes “the Judiciary and independent tribunals” as the State organs vested with exercise of the judicial authority on behalf of the people of Kenya.<sup>14</sup> This is reiterated in Article 159(1) of the Constitution which vests judicial authority in the courts and tribunals established under the Constitution.<sup>15</sup> Tribunals are considered key for access to justice as they play an important role within the justice system in Kenya of reducing pressure on courts and ensuring people access justice in an expeditious way especially in commercial matters. Tribunals also enhance the capacity of the formal conflict management institutions in the country especially now that they are placed under the Judiciary and delinked them from the executive control. Tribunals facilitate faster management and settlement of disputes and allow for specialization in jurisdiction and membership.<sup>16</sup>

PPDT is coordinated by the Office of Registrar Tribunals established by the Judicial Service Commission (JSC)<sup>17</sup> which recruits its Members and recently it filled vacancies of the eighteen (18) ad hoc PPDT members after amendment expanding the membership of the Tribunal to handle the anticipated workload in the 2022 election season. As currently constituted, the PPDT has been described as Quasi-Judicial Body, defined by H.W. R.

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<sup>13</sup> Section 38I of the Political Parties (Amendment) Act, 2022.

<sup>14</sup> Article 1(3) (c) of the Constitution of Kenya.

<sup>15</sup> Article 159(1) of the Constitution of Kenya.

<sup>16</sup> Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, (KMCO, 2019) Available at: <<http://kmco.co.ke/wp-content/uploads/2019/04/Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-30th-April-2019.pdf>>, accessed on 29 March 2022, p. 7.

<sup>17</sup> The Judiciary, “Political Parties Disputes Tribunal,” Web Page: <<https://www.judiciary.go.ke/political-parties-disputes-tribunal-ppdt/>> accessed on 29 March 2022.

Wade as a body with “powers which can be exercised only when certain facts have been found to exist.”<sup>18</sup> PPDT is limited to addressing disputes involving political parties, with other political parties, their coalition partners, their members, independent candidates, registrar of political parties and the public. The Chief Justice, describes PPDT as “a democracy enhancing institution ... through the resolution of the inter-core disputes that arise before elections...”<sup>19</sup> PPDT has a key role in protecting Kenya’s democracy and the rights of Kenyans to vote in free and fair elections.<sup>20</sup>

#### **4.0 Membership of the Political Parties Disputes Tribunal (PPDT)**

The PPDT went from dealing with only 33 cases in the 2013 pre-election season to adjudicating over 540 EDR matters in 2017 comprising 306 disputes arising out of party primaries and 234 disputes arising from party lists nominations within very stringent timelines. This surge in number of cases handled by PPDT has been attributed to its increased popularity among aspirants is what triggered the amendment to the Political Parties Act under the Political Parties (Amendment) Act, 2022 to expand the tribunal membership.<sup>21</sup>

The Tribunal is constituted of Chairperson, Vice Chairperson and Members appointed on Part-time basis. The Vice Chairperson of the Tribunal under the 2022 amendment is elected by the Members of the Tribunal. Both the

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<sup>18</sup> H.W.R. Wade, ‘Quasi-Judicial and Its Background,’ (Cambridge University Press, 16 January 2009) <<https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/quasijudicial-and-its-background/42FFEC5299ED56A01C94B7A54BC27F7B>> accessed on 29 March 2022.

<sup>19</sup> Baraza, S. and Grace, B., “Political Parties Disputes Tribunal Members Sworn in,” Kenya News Agency, Available at: <<https://www.kenyanews.go.ke/political-parties-disputes-tribunal-members-sworn-in/>> accessed on 29 March 2022.

<sup>20</sup> The Judiciary, “Three more new members join the Political Parties Disputes Tribunal,” (Judiciary, 2021), Available at: <<https://www.judiciary.go.ke/23464-2/>> accessed on 29 March 2022.

<sup>21</sup> Office of the Registrar of Political Parties (ORPP), “Communique on the Political Parties Act, 2011 as Amended as Amended by the Political Parties (Amendment) Act, 2022,” Available at:

<[https://www.orpp.or.ke/images/downloads/HighlightsofthePoliticalPartiesAmendmentAct2022\\_.pdf](https://www.orpp.or.ke/images/downloads/HighlightsofthePoliticalPartiesAmendmentAct2022_.pdf)> accessed on 29 March 2022.

Chairperson and the Vice Chair are to be Advocates of the High Court of Kenya. The Chairperson must be an Advocate of more than 10 years standing who is qualified to be appointed as a judge of the High Court while the Vice Chair is one of the three Advocates who are part-time members of the Tribunal who are Advocates of at least seven (7) years standing.<sup>22</sup> In addition to the four (4) members who are Advocates including the Chairperson and the Vice Chair, the Tribunal has three (3) other members who are professionals with outstanding governance, administrative, social, political, economic and other record.<sup>23</sup>

Notably, the PPDT was originally made of five (5) members who included the Chair and four (4) other members but this created a dilemma as the quorum of the Tribunal is three (3) members as meaning it could not hold more than one sitting at the same time.<sup>24</sup> Thus, vide the Political Parties (Amendment) Act, Act No. 21 of 2016, the membership was expanded to seven (7) members including the chair and six (6) members who are three (3) advocates and three (3) professional to handle the projected surge of disputes in the 2017 election season.<sup>25</sup> Still, this proved not enough and the 2022 Amendment effectively quadrupled the membership of the PPDT by allowing the appointment of not more than eighteen (18) ad hoc members, nine (9) advocates and nine (9) professionals, within six months to the General Election to hold office for a term not exceeding one (1) year and report to the Chairman. The JSC announced the vacancies of the eighteen (18) of the inaugural ad hoc PPDT members on 9<sup>th</sup> February 2022 to beat the

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<sup>22</sup> Section 25 of the Political Parties (Amendment) Act, 2022.

<sup>23</sup> Section 39(2) of the Political Parties Act, 2011.

<sup>24</sup> See the Original Political Parties Act, 2011 here: <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/ Acts/ PoliticalPartiesAct.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PoliticalPartiesAct.pdf)> accessed on 29 March 2022.

<sup>25</sup> Section 18 of the Political Parties (Amendment), 2016, available at: <[http://kenyalaw.org/kl/fileadmin/pdf downloads/Acts/2016/No.\\_21\\_of\\_2016.pdf](http://kenyalaw.org/kl/fileadmin/pdf downloads/Acts/2016/No._21_of_2016.pdf)> accessed on 29 March 2022.

six (6) months to General Election deadline<sup>26</sup> and the Chief Justice gazetted the new members by 15<sup>th</sup> March 2022.<sup>27</sup>

## **5.0 The Mandate and Jurisdiction of the PPDT**

The mandate of the PPDT has been described as “resolving disputes arising from the activities of political parties in Kenya.”<sup>28</sup> Section 40 of the Political Parties Act, 2011 originally provided that Tribunal has jurisdiction to determine disputes between the members of a political party, disputes between a member of a political party and a political party, disputes between political parties, disputes between an independent candidate and a political party, disputes between coalition partners and appeals from decisions of the Registrar of Political Parties under the Political Parties Act.<sup>29</sup>

The 2016 amendment enhanced the jurisdiction of the Political Parties Disputes Tribunal to include “disputes arising from party primaries” to address the need for clarity as to whether party primaries were part of the jurisdiction of the PPDT as part of “disputes between the members of a political party and disputes between a member of a political party and a political party.” However, the Political Parties (Amendment) 2016, failed to include “disputes arising from party primaries” as one requiring exhausting political parties IDRM for the jurisdiction of the PPDT to come into play.

The Political Parties (Amendment) 2022 clarified the jurisdiction of the PPDT further by making it possible to handle disputes between “a political party and the political party” of which it is a Coalition owing to the amendment allowing for corporate membership of parties in a Coalition

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<sup>26</sup> Sam Kiplangat, “JSC to Hire 18 People to the Political Disputes Tribunal Ahead of the Polls,” (Business Daily, 9<sup>th</sup> February 2022), <<https://www.businessdailyafrica.com/bd/news/jsc-to-hire-18-political-disputes-tribunal-ahead-of-polls-3710160>> accessed on 29 March 2022.

<sup>27</sup> Laban Wanambisi, “CJ Koome Gazettes 18 Ad-Hoc Members of the Political Parties Disputes Tribunal (Capital FM, 20<sup>th</sup> March, 2022), <<https://www.capitalfm.co.ke/news/2022/03/cj-koome-gazettes-18-ad-hoc-members-of-the-political-parties-dispute-tribunal/>> accessed on 29 March 2022.

<sup>28</sup> ICJ Kenya, *Ibid*.

<sup>29</sup> Section 40, Political Parties Act, 2011.

Party. Further, the Amendment replaced disputes arising from party primaries with “disputes arising from party nominations” to put the whole spectrum of activities around nomination of political party candidates under the jurisdictional ambit of the PPDT.

More importantly, the 2022 amendment amended Section 40(2) of the Political Parties Act, 2022 from a requirement that a party exhaust the party IDRM to a require that a party attempts to subject the dispute to IDRM. In particular, section 40(2) provided that the Tribunal shall not hear or determine a dispute “unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.” It was replaced with the provision that the Tribunal shall not hear or determine such dispute “unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.”

The foregoing requirement, coupled with the introduction of strict time frame of 30 days within which a political party internal dispute resolution mechanism has to conclude handling a disputes arrests the potential mischief of political parties thwarting the jurisdiction of PPDT by failing to hear or failing to determine a dispute purposely to limit the Tribunal’s jurisdiction. This amendment aligns with the jurisprudence of PPDT which had been consistent rejecting invitations to hold that non-compliance with a party’s internal procedural rules can deprive it of the jurisdiction to do substantive justice between the litigants.

In *Ibrahim Abdi Ali v Mohammed Abdi Farah & Another*,<sup>30</sup> the Tribunal held that the provisions of section 40(2) of the Political Parties Act 2011 “does not mean that an individual must always wait for a hearing and final determination from his party’s internal dispute resolution mechanisms before the can come to the Tribunal.” It suffices for one to “show that he made honest attempts at resolving the dispute within 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 arty has not concluded

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<sup>30</sup> *Ibrahim Abdi Ali v Mohammed Abdi Farah & Another* Complaint No. 29 of 2015.

a hearing and determination of his matter.” In *John Mruttu v Thomas Ludindi Mwadeghu & 2 others*, the Tribunal that finding failure to comply with the party’s procedural rules automatically ousts its jurisdiction would be “hoisting procedural technicalities above the need to do substantive justice”<sup>31</sup>

In *Erick Kyalo Mutua v Wiper Democratic Movement, Kenya & Another*,<sup>32</sup> and *Wiper Democratic Movement, Kenya v Cornelius Ngumbau Muthami*,<sup>33</sup> the High Court rejected party nomination rules which seemed to limit the parties from activating their rights at the Tribunal. The Tribunal decided in *Moses Saoyo Kusero v Jubilee Party of Kenya & Another*<sup>34</sup> that it adjudicates claims between independent candidates and political parties. It stated that its jurisdiction over the matter is not affected by the change in status from party-member to independent candidate in a dispute relating to party primaries.

Definitely, with the requirement that one shows an attempt to subject the dispute to the party’s IDRMs means, at the very minimum, it is necessary to show that the party was alerted of the dispute in question and invited to propose or take remedial action before aggrieved party proceeded to the PPDT. In *George Odede vs Orange Democratic Movement & Another*,<sup>35</sup> the PPDT struck out a Complaint where the Complainant had not attempted IDRMs before approaching the tribunal. The PPDT places lots of importance of jurisdiction and in the Mruttu Case it stated that the question of whether it has jurisdiction or not can be raised at any time including by the Tribunal itself provided where the Tribunal raises it *suo motu*, parties are accorded an opportunity to be heard.

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<sup>31</sup> Para. 17 and 18, *John Mruttu v Thomas Ludindi Mwadeghu & 2 others* [2017] eKLR.

<sup>32</sup> Complaint No. 306 of 2017, *Eric Kyalo Mutua v Wiper Democratic Movement & another* [2017] eKLR.

<sup>33</sup> *Wiper Democratic Movement v Cornelius Ngumbau Muthami* [2017] eKLR.

<sup>34</sup> Complaint No. 217 of 2017, *Moses Saoyo Kusero v Jubilee Party of Kenya & another* [2017] eKLR.

<sup>35</sup> [2017] eKLR.

## **6.0 The Powers and Remedies Available to PPDT**

The PPDT has jurisdiction to grant any order that is just and equitable provided that it is an effective remedy and the most appropriate in the circumstances of the case. The tribunal affirmed this position in *John Mruttu v Thomas Ludindi Mwadeghu & 2 others*<sup>36</sup> where it was dealing with the question of whether it could tell political parties what to do or can only make declaratory orders or issue non-binding advisory opinions for optional consideration by the political parties.<sup>37</sup> It held that the Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015.

In *Wanjiku Muhia v Faith Wairimu Gitau & another*,<sup>38</sup> the Court of Appeal held that section 40 (1) of the Act identifies the types or categories of disputes over which the PPDT can exercise jurisdiction but it does not address the question of the nature of reliefs or remedies it can grant. Unlike the express powers conferred upon an election court under Section 80 of the Elections Act, the Political Parties Act, 2011 is silent on the powers exercisable by the PPDT but that to mean that the PPDT is devoid of powers to grant appropriate remedies. In its view, where, for instance, a party in proceedings before the PPDT seeks a recount of ballots cast, and the PPDT upon recount of the ballots case concludes that the winner is apparent, the Court did not see why the PPDT cannot by order direct the political party to issue the nomination certificate to such person.

In *Mary Seneta vs Jubilee Party & Another*<sup>39</sup> the PPDT declared the nomination certificate which was already issued null and void and ordered a retally of votes in specific polling stations in Kajiado East Constituency within 24 hours. Recount was ordered also in *Melvin K. Kutol vs Nixon Kirpotich Morogo & Another*.<sup>40</sup> In *James Kerogo Onkagi vs Amani National*

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<sup>36</sup> *Complaint No. 40, [2017] eKLR.*

<sup>37</sup> *John Mruttu v Thomas Ludindi Mwadeghu & 2 others [2017] eKLR, Para. 37.*

<sup>38</sup> *Faith Wairimu Gitau v Wanjiku Muhia & another [2017] eKLR.*

<sup>39</sup> *Complaint No. 226 of 2017, Mary Seneta v Jubilee Party National Appeals Tribunal & 2 Others [2017] eKLR.*

<sup>40</sup> *[2017] eKLR.*

*Congress & Another*<sup>41</sup> the decision of the Amani National Congress to award direct nomination to the candidate was found to be unfair and unjust since there was more than one contestant. The nomination certificate was declared null and void and a fresh nomination exercise ordered.

The PPDT can also make a declaration that a candidate be issued with a nomination Certificate. In *Hillary Wasonga Soro vs Orange Democratic Movement & Another*,<sup>42</sup> the PPDT ordered for nullification of a certificate already issued and ordered that the political party issue a nomination certificate to another candidate. In *Yasir Noor Mohamed Noor vs Jubilee Party & Another*<sup>43</sup> the Tribunal ordered fresh nomination where it found that the impugned exercise in Nyali Constituency had been marred with irregularity, non-compliance with the law as well as breach of party nomination rules and the code of conduct. In *David Ogega Oyugi vs J.B. Momanyi & Another*,<sup>44</sup> the PPDT found that the nomination exercise was not conducted in compliance with the law and Constitution, declared the exercise declared null and void and directed that fresh nomination be held within the 48 hours of the Judgment.

The PPDT can also make a declaration in relation to the membership of a political party. In *Moses Saoyo Kuseor v Jubilee Party of Kenya & Another*<sup>45</sup> where a candidate had taken steps to revoke his membership and seek nomination as an independent candidate, the PPDT stated that the candidate could reclaim his membership of the political party but was effectively barred from contesting as a candidate or rescinding an earlier resignation. The PPDT has also nullified nominations where it was proved the political

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<sup>41</sup> Complaint No. 233B of 2017, *James Kegoro Onkangi v Amani National Congress Party & Another* [2017] eKLR.

<sup>42</sup> Complaint No. 230 of 2017, *Hillary Wasonga Soro v Orange Democratic Movement* [2017] eKLR.

<sup>43</sup> Complaint No. 244 of 2017, *Yasir Noor Mohamed Noor v Jubilee Party* [2017] eKLR.

<sup>44</sup> Complaint No. 34 of 2017, *David Ogega Oyugi v J. B. Momanyi & Another* [2017] eKLR.

<sup>45</sup> Complaint No. 217 of 2017, *Moses Saoyo Kusero v Jubilee Party of Kenya & another* [2017] eKLR.

party breached its nomination rules or party constitution. This was the case in *Denis Mugendi & 3 Others vs Party of National Unity*.<sup>46</sup> In the case of *Alphonse Mbindwa vs John Okemwa Anunda & Party of National Unity*,<sup>47</sup> the Tribunal also nullified improper exercise of party authority by the governing organs of political parties.

The PPDT has also made declaration on the composition of Election Boards and allegations of bias on their part. In *Patrick Kabundu vs Jubilee Party & 5 Others*,<sup>48</sup> failure to regularly constitute and election board resulted in or largely contributed to the faulty nomination resulting in the nullification of the exercise. In *Daniel Okiddy Ojwang vs William Owiti & Another*<sup>49</sup> the Tribunal found that the Election Board acted arbitrarily in issuing a certificate to a different candidate in contravention of the declaration by the duly appointed Returning Officer. The Respondents were directed to issue the Claimant with the final nomination Certificate for Member of the County Assembly, East Asembo Ward, Rarieda Constituency and to send notification to the IEBC.

The PPDT has also pronounced itself on the limitation on PPDT powers with respect to remedies. In *James Kariuki Karanja alias Karis vs John Kamangu Nyumu & 2 Others*,<sup>50</sup> the Tribunal declined to order expulsion of a member from the political party. In *Erick Omondi Anyanga vs Orange Democratic Movement & Another*<sup>51</sup> the question arose whether the jurisdiction of the Tribunal was extinguished when a nomination had been presented to the IEBC in accordance with Section 13(2) of the Elections Act, 2011. The

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<sup>46</sup> Complaint No. 34 of 2017, *Denis Mugendi & 3 Others vs Party of National Unity*, [2017] eKLR.

<sup>47</sup> [2016] eKLR.

<sup>48</sup> Complaint No. 538 of 2017, *Jubilee Party of Kenya v Patrick Kabundu Mukiri & another* [2017] eKLR.

<sup>49</sup> Complaint No. 159 of 2017, *Daniel Okiddy Ojwang v William Owiti & another* [2017] eKLR.

<sup>50</sup> Complaint No. 59 of 2017, *James Kariuki Karanja alias Karis V John Kamangu Nyumu & 7 others* [2017] eKLR.

<sup>51</sup> Complaint No. 104 of 2017, *Edick Omondi Anyanga vs Orange Democratic Movement & Another* [2017] eKLR.

PPDT determined that it had jurisdiction even after a nomination had been presented to the IEBC.

## 7.0 Emerging Jurisprudence of PPDT on Key Issues

### 7.1 Jurisdiction Requiring Party IDRM to be Exhausted First

In *Gabriel Bukachi Chapia v Orange Democratic Movement & Another*,<sup>52</sup> the PPDT underscored the need to exhaust party internal dispute resolution mechanism (IDRM) before engaging its jurisdiction as a necessity for the promotion and protection of the national values and principles of governance including multi-party democracy. The Tribunal cited its verdict in *Hezron J Opiyo v Peter Anyang Nyong'o & others*<sup>53</sup> to emphasize the need to exhaust internal party mechanisms where it noted “*there is need for everyone, this Tribunal included, to promote and protect the multi-party system in our country. This is the rationale of section 40 of the Political Parties Act, 2011; promotion of internal parties internal democracy and autonomy.*”

In essence, once the Tribunal found that a Claimant has exhausted the party’s internal dispute resolution mechanism his cause turns into a justiciable claim before this Tribunal. The Tribunal held in the *Caroli Omondi v Hon. John Mbadi & 2 Others*<sup>54</sup> that direct nominations is not a new nomination process which ought to be subjected to fresh internal dispute resolution mechanisms. Under the 2022 Amendments of the Political Parties Act, 2011, all a claimant needs to prove is evidence of attempt to apply the respective Party’s IDRM for the Tribunal to have jurisdiction over their case.

The Political Parties (Amendment) Act, 2022 provides that evidence of effort to exhaust Party IDRM is sufficient to trigger the jurisdiction of PPDT. This aligns with the ruling of PPDT in *Jared Kaunda Chokwe Barns V. Orange Democratic Movement & 2 Others*<sup>55</sup> that if the Complainant made an attempt

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<sup>52</sup> Complaint No 237 Of 2017.

<sup>53</sup> Complaint No 47 of 2017.

<sup>54</sup> Complaint No. 42 of 2017.

<sup>55</sup> Complaint No. 259 of 2017.

to engage the Party internal dispute mechanism, it has jurisdiction to determine this complaint. ' The Tribunal stated:

*'In light of this we find that by writing to the Party, the Complainant made an attempt to engage the Party in resolving the dispute. Indeed, if the 1st Respondent was to act on the dispute the presumption is, the same would have been resolved. We therefore find that the Complainant made an attempt to engage the Party internal dispute mechanism and thus, we have the jurisdiction to determine this complaint.'*

## **7.2 Overlap in Jurisdiction Between PPDT and IEBC**

Article 88 of Constitution and IEBC Act vest IEBC with jurisdiction to resolve nomination disputes. Parliament acknowledged the concurrent jurisdiction of the two bodies, IEBC and PPDT, when enacting Section 40(1) (fa) of the Political Parties Act introduced through the Political Parties (Amendment) Bill, 2016. Under Clause 19 of the memorandum of objects and reasons it was indicated that the object of amending the Political Parties Act to introduce Section 40(1) (fa) was to address *"the challenge of concurrent jurisdiction with other bodies handling electoral disputes."*

There are several cases have dealt with the issue of the overlapping jurisdiction between PPDT and IEBC. In the High Court Judicial Review Case *Republic vs. IEBC & 3 Others Ex-Parte Hon. Wavinya Ndeti*,<sup>56</sup> the learned judge (Odunga J) allowed the application for Judicial Review holding *inter alia* that the issue before the court was not *res judicata* because although the dispute before the PPDT and IEBC committee were substantially similar the issue before the PPDT was whether or not Hon. Wavinya was a member of Wiper Party while the issue before the IEBC committee was Hon. Wavinya's alleged dual party membership and the disputes involved different complainants. Odunga J stated:

*119. It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on*

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<sup>56</sup> *Nairobi Hc Misc. App. No. Jr 301/2017*

*the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent."*

The Court of Appeal (Githinji, Okwengu, J.Mohammed JJA) in *Kyalo Peter Kyulu V. Wavinya Ndeti & 3 Others*,<sup>57</sup> being an appeal from decision of Odunga J above, stated, "...These were issues that fell within the IEBC committee's ostensible jurisdiction and ....within the jurisdiction of PPDT...the issues were substantially similar and if the tribunal could deal with one there was no reason why it could not deal with other issue.

In the Court of Appeal case of *Fredrick Odhiambo Oyugi V Orange Democratic Movement & 2 Others*<sup>58</sup> held that there is no doubt that both the IEBC and the PPDT are clothed with the power to deal with disputes arising from nominations. However, the conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act cannot oust the jurisdiction of the IEBC to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked. Neither can that jurisdiction be taken away from IEBC by a memorandum of understanding. The Political Parties Act has since been amended to provide that the PPDT has jurisdiction to deal with Party

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<sup>57</sup> [2017] eKLR.

<sup>58</sup> [2017] eKLR, Court of Appeal (Okwengu, Gatembu Kairu, Murgor JJA)

Nomination but it is not clear if this is enough to deal with this issue of concurrent jurisdiction which has been subject to abuse by mischievous litigants.

In *Eric Kyalo Mutua vs. Wiper Democratic Movement And Another*<sup>59</sup>, the Court of Appeal further stated that, there is “an urgent need for law reform with a view to providing a clear and orderly framework for resolution of disputes arising from or relating to nominations so as to avoid a conflict or clash of jurisdictions between the IEBC under Article 88(4)(e) of the Constitution and that of the PPDT under Section 40 of the Political Parties Act” so as “to avoid parallel streams of adjudication of disputes arising from nominations that might lead to confusion and conflicting approaches and decisions, and for good order.”

## **8.2 The Contempt Jurisdiction of the PPDT**

Section 41(3) of the *Political Parties Act*, provides that ‘a decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.’ The High Court in *David Odhiambo Ofuo v Orange Democratic Movement Party & 2 Others*<sup>60</sup> stated in the above cases that it has no jurisdiction to enforce the orders of the PPDT as that power vested in the Tribunal itself and that it can only deal with an appeal arising from PPDT’s orders in contempt proceedings. Justice Muchelule stated:

*“Under section 41(3) of the Act the Tribunal has powers to enforce its decisions in the same manner a magistrate’s court can enforce its decisions. Under section 10 of the Magistrate’s Courts Act (no. 26 of 2015) a magistrate’s court has powers to punish any person who is in wilful disobedience of its judgment, decree, order or direction. This means that the Tribunal can punish the respondents if it finds that they have disobeyed its orders. This court can only deal with an appeal arising from the Tribunal’s orders in the contempt proceedings.”*

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<sup>59</sup> Civil Appeal No. 173 Of 2017

<sup>60</sup> (Election Petition Appeal No 11 Of 2017), Para 5.

However, in *Secretary General & Another V. Salah Yakub Farah*<sup>61</sup> the High Court took a conflicting position and held that:

*In the end, I am not convinced that the PPDT had any jurisdiction to punish for contempt in the face of the court or any other form of contempt save contempt on the face of the court. The PPDT however in the instant case convicted the two officials of KANU for contempt which falls in the realm of indirect contempt. This is evident on the fact that the court had to be prompted through a motion filed by the Respondent. In proceeding as it did, the PPDT in my humble view obtained its jurisdiction in this respects ‘through craft’. It overarched. It could not convict the Appellants for want of jurisdiction. The appeal succeeds to that extent.*

In *Robert Pukose v Alvin Chepyagan Sasia & 3 others*,<sup>62</sup> the High Court had a similar holding to the Case of *Salah Yakub Farah*. The High Court held that under Section 6 of the Contempt of Court Act, the subordinate courts, and by extension the Tribunal, could only punish for contempt on the face of the court but not contempt away from the face of the court or for breach judgment and decrees committed outside the court or tribunal.

In *Bernard Muia Tome Kiala v Wiper Democratic Movement-Kenya & another*,<sup>63</sup> the PPDT relied on Article 3(c) of the Constitution as the basis for which the Tribunal’s power to punish for contempt originates. It however observed that since there was application to punish the defaulting parties, then it was going to remain silent on the matter. The Tribunal therefore took the view that the power to enforce its orders was inherent in its powers and proportionate to the requirement to achieve justice in each instance. It

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<sup>61</sup> *Secretary General & another v Salah Yakub Farah* [2017] eKLR, Election Petition Appeal No 17 of 2017.

<sup>62</sup> *Robert Pukose v Alvin Chepyagan Sasia & 2 others* [2017] eKLR, Election Petition Appeal No 83 of 2017.

<sup>63</sup> Complaint No. 40 of 2017, *Bernard Muia Tom Kiala v Wiper Democratic Movement – Kenya & another* [2017] eKLR.

reiterated that the orders of the tribunal were not made in vain and were meant for compliance.

### **7.3 Reviews of PPDT Decisions**

The PPDT (Procedure) Regulations, 2017 provide that the Tribunal may, of its own motion or upon application by an aggrieved party, review its decisions or orders and further provides that an aggrieved party may, within fourteen days from the date of the decision or order apply for review to the Tribunal and that the law applicable in Civil matters shall with the necessary modifications apply in reviews before the tribunal. In *Joan Ogada v Orange Democratic Movement & Another*,<sup>64</sup> PPDT allowed review for material non-disclosure finding that information withheld was needed to enable the Tribunal to make an informed decision ought to have been availed. The applicant had sought a review of the PPDT orders on the basis that the IDRMR decision based on which the 1st Respondent had successfully applied for review, had been obtained without disclosing that there was an earlier decision in respect of the same matter. The PPDT held that the determination of who was the rightful holder of the certificate was a key concern at each stage of decision making and all information that was needed to enable the Tribunal to make an informed decision ought to have been availed. Thus, the information availed through the review application was crucial as it was the key party officials who could assist the Tribunal determine the issue with finality. The review application was therefore allowed.

### **7.4 Appeals from Decisions of the PPDT**

The PPDT (Procedure) Regulations, 2017 provide that a person aggrieved by a decision of the Tribunal may within thirty days from the date of the decision or order, appeal to the High Court. In the case of *Erick kyalo Mutua v Wiper Democratic Movement, Kenya & another*, the Appellant's extended argument was that the court on appeal may not correct an order or issue any other order. The High Court held that on appeal from decision of PPDT, the

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<sup>64</sup> Elphas Odiwour Omondi v Joan Minsari Ogada & 3 others [2017] eKLR, Election Petition Appeal No. 51 and 52 of 2017.

court may make any order it deems efficacious for purposes of settling and definitely determining the issues in dispute. The Court stated:

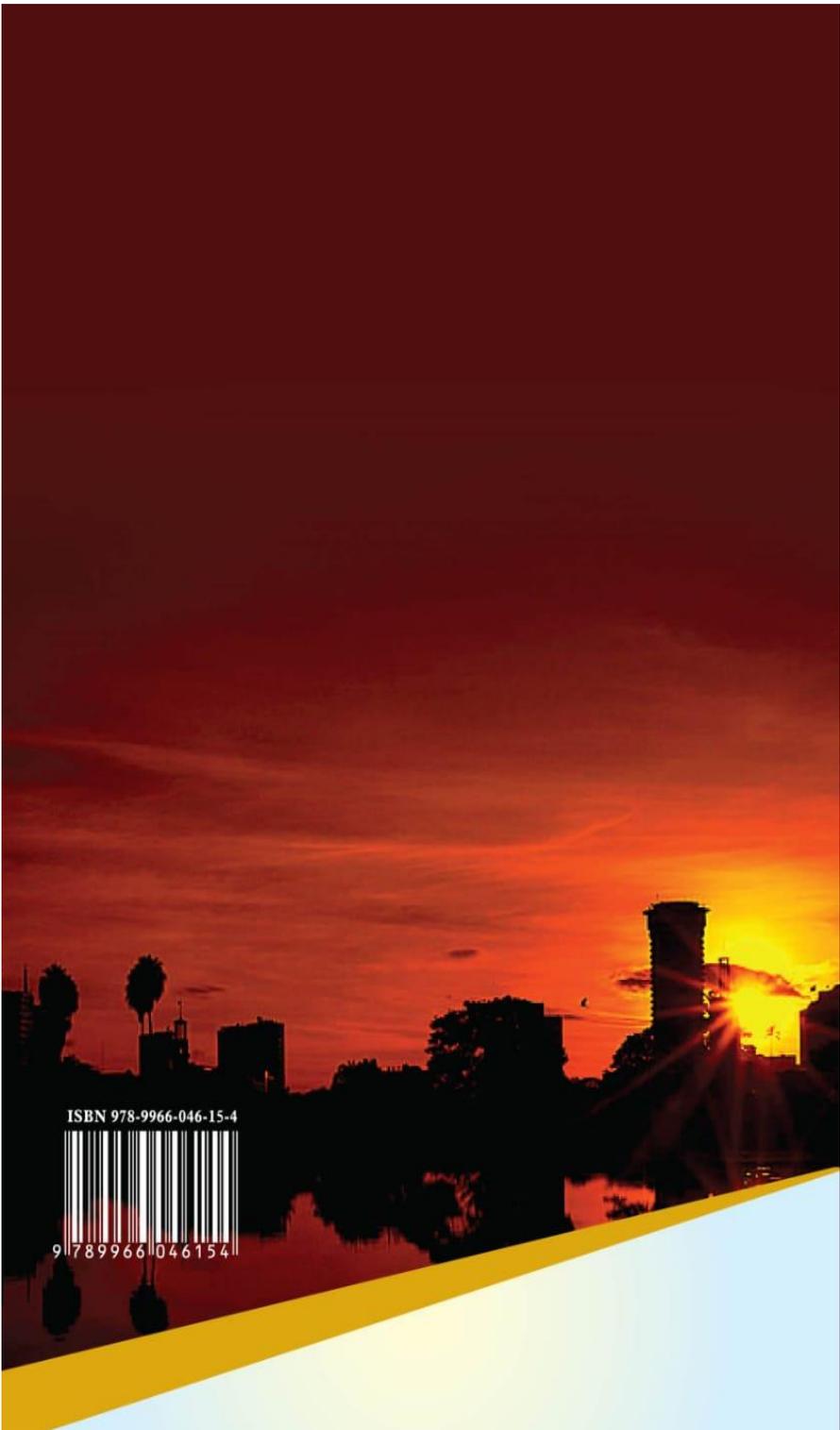
*“58. The Appellant’s extended argument was also that this court on appeal may also not correct other order or issue any other order. My brief answer to the Appellant n this is that Order 42 Rule 32 of the Civil Procedure Rules is relatively clear on the powers of an appellat court. It stipulates thus: “The Court which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such Respondents may not have field any appeal or cross-appeal.”*

## **8.0 Conclusion and Proposals for Reforms On PPDT**

The recent amendments to the Political Parties Act, 2011 to allow for Coalition Political Parties is bound to bring in its wake more intense and complex activity at the Political Parties Disputes Tribunal (PPDT). However, the expansion of the PPDT following the infusion of the *ad hoc* members will likely help to cushion against many of the potential challenges especially as relates to workload. However, provision that the ad hoc members be appointed six (6) months to the election limits the extent of capacity building that can be undertaken to equip them for the task ahead. It also beats logic every election season to appoint and train new ad hoc members. It would be better to have the ad hoc members serving on need basis or eligible for future re-appointment.

There are areas that have been identified as requiring immediate reform to enable smooth running of the affairs of PPDT. In the first place, the mandate and jurisdiction of the PPDT need to be made clear and separate from other state organs like IEBC and Office of the Registrar of Political Parties (ORPP). In this regard, it is recommended that the Parliament should enact a separate act that clearly deals with PPDT from its establishment,

composition, duties, jurisdiction and its powers. Relatedly, there is also need to support the review of policy and legislative reform related to elections to create enabling legal and policy framework for effective dispute resolution. Further, there should be a mechanism put in place to educate the public about PPDT to continue enhancing the awareness as to its activities, jurisdiction and role in the election process and election dispute resolution (EDR). There is also need for strengthening the capacity of the relevant mechanisms for efficient electoral dispute resolution so that the credibility of these institutions as arbiters of disputes is enhanced. The strengthening of these institutions will ultimately lead to sustainable peace, the entrenchment of democratic electoral outcomes in Kenya, and continued equitable socio-economic development in the country. In addition, there is need to bring together multiple stakeholders to undertake legislative and institutional reforms on elections and dispute resolution management. In terms of training, it is necessary to provide training for judges, magistrates and other Judicial officers working on electoral dispute resolution. This may call for the embedding of training curricula in the Judicial Training Institute to provide continuous and updated skills on electoral dispute resolution.



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