



**Alibea Services Limited v National Government Constituency Development
Fund Board & another; Fund Account Manager- National Government
Constituency Fund Bondo Constituency & another (Interested Parties) (Civil
Case E001 of 2022) [2022] KEHC 10922 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E001 OF 2022**

RE ABURILI, J

JUNE 22, 2022

BETWEEN

ALIBEA SERVICES LIMITED PLAINTIFF

AND

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND
BOARD 1ST DEFENDANT**

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND
COMMITTEE OF BONDO CONSTITUENCY 2ND DEFENDANT**

AND

**FUND ACCOUNT MANAGER- NATIONAL GOVERNMENT
CONSTITUENCY FUND BONDO CONSTITUENCY INTERESTED PARTY
HEADTEACHER SIREMBE PRIMARY SCHOOL INTERESTED PARTY**

RULING

1. This ruling determines the Preliminary Objection dated 6th April, 2022 and argued on 20/6/2022 brought by the 1st defendant under Section 56 of *National Government Constituencies Development Fund* (NGCDF).
2. The 1st Defendant's case is that the *NGCDF Act* requires that civil disputes must be referred to the board in the first instance and where necessary, an arbitration panel be constituted at the cost of the parties before reference to court.
3. The 1st defendant's counsel submitted that the plaintiff admitted writing to the National Government Constituency Development Fund (NGCDF) Board, and the Board embarked on a dispute resolution



mechanism and allocated the matter for hearing before the Board on 7/4/2022, a date by which the Plaintiff had already moved this court vide this suit in February 2022 thereby not giving the 2nd Defendant the opportunity to conclude the matter and refer it to arbitration.

4. It is the 1st defendant's case that this suit is premature and contravenes section 56 of the [National Government Constituency Development Fund \(NGCDF\) Act](#) and thus they urge the court to find that the Board has jurisdiction to hear and determine the dispute first before the Plaintiff can approach the court for further relief.
5. Mr. Mutiso counsel for the 1st defendant further submitted that the statutory reliefs provided for in law have not been exhausted by the plaintiff and as such the Preliminary Objection be allowed as prayed.
6. Opposing the preliminary objection, the plaintiff's counsel submitted that his client entered into a contract with the 2nd Defendant and has been pursuing payment in vain. The plaintiff through his advocate Mr. Ochieng submitted that last year, 2021, his client wrote to the 1st Defendant and sought for intervention for the tendered sum.
7. It is the plaintiff's counsel's contention that the plaintiff filed documents showing the correspondence between their client and the 2nd Defendant; that their client was not aware of the committee put together to hear the dispute; and that the Board has not shown interest in resolving the dispute.
8. In the plaintiff's view, time was of essence and that the Board brought up issues of some Kshs. 800,000/= having been paid which was not true because there were two different tenders. The plaintiff further alluded to the limitation period in contract being 6 years and thus prayed for dismissal of the Preliminary Objection to enable it proceed with the hearing of this suit.

Analysis and Determination

9. Since the issue under consideration was raised by way of a Preliminary Objection, an examination of the law on preliminary objections is of utmost importance. In the *locus classicus* case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696, the court had this to say on what a preliminary objection is:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

10. The issue for determination therefore is whether the preliminary objection herein as raised meets the threshold set out in the Mukisa Bisuit Case. In [John Musakali v Speaker County of Bungoma & 4 others](#) (2015) eKLR, it was held that:

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”



11. Ojwang, J (as he then was) in *Oraro v Mbaja* (2005) KLR 141 citing Law, JA. in the Mukisa Biscuits case (*supra*) stated as follows:

“ A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

12. Distinguishing the preliminary objection herein and the contents of the plaint with the law, the 1st defendant has raised the issue of this court not being possessed of jurisdiction to handle this suit in the first instance as that would be in contravention of section 56 of the *NGCDF Act*. For this reason, I find that the preliminary objection fits the test set out in the Mukisa Bisuit case. This is because jurisdiction on its own, if successfully pleaded is a pure point of law capable of disposing of a matter without delving into its merit.
13. In my humble view, the preliminary objection, if successful, is capable of finally disposing the whole suit. The objection raised therefore achieves the threshold of a pure preliminary point of law. The objection is also clear on the provision of the law allegedly violated.
14. The subject of Courts' jurisdiction is now well settled by several judicial pronouncements. The Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) *Justice Kalpana H. Rawal v Judicial Service Commission & Others* in demystifying jurisdiction cited the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows:

“...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

15. On the source of a Court's jurisdiction, the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

“ A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. The 1st defendant relied on section 56 of the [NGCDF Act](#) and submitted that the plaintiff sought recourse from the Board provided for in section 56 but that before the Board could hear the matter on the 7/4/2022 and render its decision, the plaintiff had filed this suit in February, 2022.

17. Section 56 of the [National Government Constituency Development Fund Act](#) provides that complaints and civil disputes by persons arising due to the administration of the Act shall be forwarded to the Board in the first instance. In particular section 56 (3) stipulates that:

“Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by the consensus of the parties to consider and determine the matter before the same is referred to court.”

18. The plaintiff herein admits that it indeed wrote to the Board but was not aware of the committee put together by the Board to hear the dispute. The plaintiff’s counsel further submitted that the Board had not shown interest in resolving the dispute but subsequently stated that the Board brought up issues of Kshs. 800,000 having been paid to the plaintiff which was not true because there were two different tenders. The plaintiff further alluded to the limitation period being 6 years and thus prayed for dismissal of the Preliminary Objection to enable them proceed with the hearing and determination of this suit.

19. The question that this court must answer is whether this court has the jurisdiction to entertain this dispute in view of the said provisions of the [NGCDF Act](#).

20. The Court of Appeal in the case of [Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others](#) [2015] eKLR 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

21. The High Court in [Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others](#) [2015] eKLR stated as follows on the rationale for the requirement for recourse to alternative dispute resolution mechanisms before resorting to judicial process:

“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 fess 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 fueled 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...”

22. In the instant suit, there was no evidence presented by the plaintiff to support the submission that they had been rebuffed by the Committee. In contrast, the plaintiff’s counsel submitted that the Board brought up the issue of Kshs. 800,00 being paid but that this was for another of his tenders indicating that indeed the plaintiff’s dispute was being handled before the Board, prior to the filing of this suit.
23. It is also not clear why the plaintiff has sat silent on his claim from the year 2017 and approached both the Board and this court a few months to being caught up by the statute of limitations only for the plaintiff company to now turn and claim before this court that the Board was lax in its handling of the dispute. Equity aids the vigilant and not the indolent. Delay defeats equity.
24. Section 56(3) of the [National Government Constituency Development Fund Act 2015](#), makes it mandatory for the petitioners to make their claim before the Board in the first instance. The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. (See the case of [Republic v Kenya Revenue Authority Ex Parte Style Industries Limited](#) 2019] eKLR).
25. In [International Centre for Policy and Conflict Resolution & 5 others v Attorney General & 4 others](#) [2013] eKLR cited in [Geofrey Kirimi Mathiu & 2 others v Constituency Development Fund \(CDF\) & 2 others](#) [2013] eKLR it was stated that:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies and state organs to deal with the dispute under the relevant provision of the parent statute...where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....”

26. In [Ndiara Enterprises Ltd v Nairobi City County Government](#) [2018] eKLR where this court had the opportunity to determine a case on the basis that the applicant had failed to exhaust the legal remedies available in law before resorting to court, on appeal, the Court of Appeal had this to say, among others, while upholding the decision of this court:

“Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of [The speaker of The National Assembly v Njenga Karume](#) (2008) 1 KLR 425, [Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor](#) (2015) eKLR for that proposition.

...Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court’s power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure



for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue...

On the authority of Owners of the *Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."

27. Article 159 (2) (c) of the *Constitution* commands the courts and tribunals in their exercise of judicial authority to promote alternatives forms of dispute resolution which includes reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. It is therefore the duty of this court to encourage parties and especially where matters can be resolved through Alternative Dispute Resolution mechanisms and more so, where the statute provides for such mechanisms, for parties to a dispute to make use of those alternative dispute resolution mechanisms and not by pass those mechanisms.
28. In the instant case, it is not in doubt that a civil dispute arose on the payment of the contractual sums of money allegedly due and owing by the 2nd defendant to the plaintiff. *Black's Law Dictionary* Tenth Edition at page 572 defines "Dispute" as: "A conflict or controversy, especially one that has given rise to a particular law suit." Controversy is defined at page 406 as "A disagreement or a dispute, especially in public."
29. Accordingly, it is my conclusion that the applicant ought to have first exhausted the available dispute resolution mechanisms provided for in the statute before approaching this court.
30. What then should this court do? As earlier on stated herein, the nature of a preliminary objection is that if determined in favour of the party who raises it then its effect is that it renders the suit a nullity. Further, the issue raised by the 1st defendant touches on jurisdiction of the court.
31. In the distinguished case of *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* ((1989) KLR 1653 (C.A) the court held thus:

"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."
32. In the *Ndiara Enterprises (supra)* case, the Court of Appeal stated as follows:

"On the authority of Owners of the Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."
33. In the circumstances of this case, having found that there is an alternative dispute resolution mechanism available to the parties which mechanism was not exhausted before resorting to this court, I find this suit incompetent. I uphold the preliminary objection. The plaintiff's suit against the defendants herein is hereby struck out for want of jurisdiction in the first instance. Each party to bear their own costs of the suit as struck out.



34. Orders accordingly. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF JUNE, 2022

R.E. ABURILI

JUDGE

