



REPUBLIC OF KENYA



Deshko Enterprises Ltd v National Constituencies Development Fund Board CEO & 2 others (Petition E003 of 2021) [2022] KEHC 3049 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
PETITION E003 OF 2021**

KW KIARIE, J

JUNE 21, 2022

BETWEEN

DESHKO ENTERPRISES LTD PETITIONER

AND

**NATIONAL CONSTITUENCIES DEVELOPMENT FUND BOARD CEO & 2
OTHERS RESPONDENT**

RULING

1. The respondents herein raised a preliminary objection dated September 20, 2021 premised on the following grounds:
 - a. That the petition dated 4th March is fatally and incurably defective in law and as such cannot stand or be ventilated before this honorable court.
 - b. That the petition contravenes mandatory provisions of law.
 - c. That the petition is fatally and incurably defective and cannot stand in law
 - d. That the continued pendency of the petition is an abuse of the process of the court.
 - e. That the said petition is misconceived, misdirected and misled and therefore the prayers sought cannot stand in law.
 - f. That this court lacks jurisdiction to hear and determine this petition. The [NG-CDF Act of 2015](#) provides under section 56 the procedure for dispute resolution.
2. The preliminary objection was opposed on grounds that:
 - a. That petitioner herein instituted Homa Bay Chief Magistrate's Court Civil Suit No.28 of 2019 seeking payment of the contractual sum owing by the 2nd respondent and the same was referred by consent to arbitration and the petitioner which the 1st and 2nd respondents had not been



keen and showed no interest to have the matter heard and/or determined which forced the petitioner herein to file another complaint before the 1st respondent herein on 23rd September, 2019 vide Reference No.848 against 2nd respondent which the respondents have since ignored, failed and/or refused to prosecute and or arbitrate over. [Sic]

- b. That the 1st and 2nd respondents had since gone to slumber over this matter for longest time and only woke upon the petitioner herein filing this petition as against them. The petitioner had vide letters June 10, 2019, February 12, 2020 and September 2, 2020 written to the 1st and 2nd respondents over the said matter reminding them to act on Reference No.848 filed by the petitioner which they had since failed to show interest to have the matter heard and/ or determined.
 - c. That the 1st and 2nd respondents in their application are seeking for an equitable remedy but have come to court with unclean hands knowing very well that the petitioner had complied with section 56 of the [NG-CDF Act](#) and it is their lack of interest to have the matter heard and/or determined when the same was filed before them after the court in Homa Bay Chief Magistrate's Court Civil Suit No.28 of 2019 referred the same to arbitration and the various correspondence letter by the petitioner reminding them of the same and now try to hoodwink the court and play the innocence card with the said application to have the court down its tools for lack of jurisdiction.
 - d. That additionally, the said incident that led to the institution of this suit occurred on July 7, 2019 even before the impugned decision in Supreme Court petition No.4 of 2019 relied upon by the defendant delivered December 3, 2019 and the same cannot operate backwards.
 - e. That it is only fair and just that the said application must fail as justice delayed is justice denied.
3. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 paragraph D-F Law JA as he then was, stated:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

4. An issue of jurisdiction is a point of law. Justice Nyarangi (JA) in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where stated as follows:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 paragraph D-F Law JA as he then was, stated:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the



Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

5. Section 56 of *National Government Constituencies Development Fund Act, 2015* provides:

All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.

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 consensus of the parties to consider and determine the matter before the same is referred to court.

Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board's decision and determine the matter.

Subject to this Act, no person in the management of the Fund shall be held personally liable for any lawful action taken in his official capacity or for any disputes against the Fund.

6. The petitioner other than saying a reference number 848 was made on September 23, 2019 no demonstration has been made of compliance with section 56 of *National Government Constituencies Development Fund Act, 2015*. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR the Court of appeal held:

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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.

7. The upshot of the foregoing is that at the first instance this court lacks jurisdiction to entertain the petition. The same is struck out with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

