



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 40 OF 2017

JAMES CHERUIYOT.....PETITIONER

-VERSUS

NATIONAL GOVERNMENT CONSTITUTION DEVELOPMENT

FUND MANAGER NAKURU

WEST CONSTITUENCY1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER

NAKURU SUB-COUNTY.....2ND RESPONDENT

SAMUEL O. ARAMA.....3RD RESPONDENT

RULING

1. This ruling is in respect of the preliminary objections raised by the 1st, 2nd and 3rd respondents to the petition dated 14th December 2017 filed by James Cheruiyot and 23 others (petitioners).

2. The petitioners sought a declaratory order that the process of appointing, interviewing and recruiting Nakuru West Constituency Development Fund members was unconstitutional for contravening **Article 10 and 73 of the Constitution** and was therefore null and void. They sought a further order for a re-advertisement of the recruitment process of the Nakuru West Constituency Development Fund members.

3. Pending the hearing and determination of the petition, the petitioners sought a temporary injunction to restrain the CDF members from disbursing CDF funds and from holding any meetings whatsoever. Both the petition and the application are brought under **Articles 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 48, 56, 73, 159, 165 (3) (d) and 259 of the Constitution**.

4. The 1st respondent filed notice of a preliminary objection dated 17th January, 2018 on grounds that:

(i) The application and petition herein offends the mandatory provision of section 56 (3) of the National Government Constituencies Development Act, 2015 which makes it mandatory for all disputes to be referred to the Board in the first instance.

(ii) The application herein that the CDF Committee members ought to be appointed based on their ethnicity has no legal basis in law and is thus a gross abuse of the Court's process. The qualification appointment and composition of the members of the Constituency Development Fund Committee is well governed and embodied in Section 43 (2), (3) and (4) of the said Act and Regulations Regulation 5 (6) of the National Government Constituencies Development Fund Regulations, 2016 and ethnic considerations are not a criteria therein.

(iii) The petitioners' attempt to have the committee appoint its members in contravention of what is provided for in the Act is an illegality and thus a gross abuse of this Court's process. This Honourable Court cannot be used to aid such illegality.

(iv) The application herein is fatally and incurably defective as there is no reasonable cause of action known in law that has been established against the 1st Respondent herein and as such this suit is a gross abuse of the Court process and ought be struck out with cost to the 1st Respondent.

5. The 2nd respondent filed a notice of preliminary objection dated 2/1/2018 (as amended) on grounds that it offends the mandatory provision of **Section 56 (3) of the National Government Constituency Development (NGCDF) Act 2015**. They prayed that the both the petition and application be dismissed with cost to the respondents.

6. The 3rd respondent filed a preliminary objection on the grounds that the application against the 3rd Respondent is frivolous, vexatious and an abuse of the court process. That it offends the National Government Constituency Development Fund 2015, and; does not disclose reasonable cause of action against the 3rd respondent.

7. The three preliminary objections were heard together. Parties canvassed the preliminary objections orally and filed authorities to support their respective positions. I have carefully considered the submissions and the authorities cited to me.

8. The issue is whether the court has jurisdiction to entertain the petition when the petitioners have not complied with or exhausted the procedure provided for under **Section 56 (3) of the NGCDF Act 2015**. Other issues are whether 1st and 3rd defendants are rightly enjoined in the petition.

9. **Mr. Ondieki** learned counsel for the 2nd respondent submitted that **Section 56 (3) of the National Government Constituency Development Fund Act 2015** provided that all complaints shall be forwarded to the Board. He submitted that the court lacked jurisdiction to entertain the petition because there was a clear and mandatory procedure provided by the Act and that the court therefore must down its tools. He further submitted that by coming to court the petitioners seek to avoid the procedure provided by law. He cited the case of **Geoffrey Karimi & 2 others V. Constituency Development Fund Board & 2 others 2013 eKLR**.

10. **Ms. Muthoni** learned counsel for the 1st respondent submitted that the main issue in their preliminary objection was whether the petitioner could side step **section 56 (3) of the NGCDF Act** in approaching the court. She submitted that the 1st respondent was under the direct supervision and deployment of the Board and therefore ought not be sued. Further she submitted that **section 53 (6) of the Act** made it mandatory for disputes to be referred to the Board in the first instance. She relied on the following authorities.

(i) *Oraro vs Mbaja [2005]eKLR*.

(ii) *Republic vs Chief Registrar of the Judiciary vs constituency Development Fund CDF Board & others [2015]eKLR*.

(iii) *Geofrey Kirimi Imathiu & 2 others V Constituency Development fund CDF Boars & 8 others [2013]eKLR*.

(iv) *Anarita Karimi Njeru v Republic [1979] eKLR*.

11. **Mr. Nyagaka** learned counsel for the 3rd respondent submitted that the 3rd respondent was wrongly sued. He stated that the CDF Act 2013 was repealed and that under the new law the Member of Parliament is not a member of the Board and has no role to play in the appointment of CDF members. He cited several authorities namely;

(i) *David Gitahi (Suing as the Chairman of Othaya Residents' Foundation –vs- Attorney General [2014] eKLR*.

(ii) *Geofrey Kirimi Imathiu & 2 others V Constituency Development fund CDF Board & 8 others [2013]eKLR*.

(iii) *Argos & Furnishers Limited –vs- Municipal Council of Mombasa [2014]eKLR*

(iv) *Institute of Social Accountability & another –vs- National Assembly & 4 others [2015]eKLR*.

12. **Mr. simiyu** learned counsel for the petitioner responded to the preliminary objection in lengthy oral submissions. He submitted that the issues raised by the respondents touched on contestable facts and were therefore not amenable to a preliminary objection. He submitted that the grounds raised in the petition were constitutional arguing that the **NGCDF Act** derives its life from the Constitution and the petitioners were therefore rightly before the Constitutional Court. In response to the 2nd respondent's preliminary objection, counsel submitted that failure to take the procedure under **section 56 (3) of the Act** cannot be raised by way of a preliminary objection. He submitted that the court has jurisdiction where there was failure to uphold the principles of natural justice. He further submitted that the procedure under **section 56 (3)** was not mandatory in view of the provision for arbitration. Stating that the CDF members had already been gazetted, counsel urged the court to dismiss the preliminary objection as it was only the court which can quash the gazette notice.

Analysis and determination

13. The meaning and principles that circumscribe a preliminary objection has been expressed in many decisions. In **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 698**, the court (Law J.A) stated thus:

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleading and which if argued as a preliminary point may dispose of the suit.”

The court went on further to state (as per Sir Charles Newbold J.A):-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issue. The improper practice should stop.”

14. All 3 preliminary objections are predicated on **Section 56 (3)** of the NGCDF Act. The Section states thus:-

“(3) 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.”

15. As stated above the petitioners are aggrieved by the process of appointment of members of the CDF committee. They feel that a significant section of the community was left out and fear that the skewed composition of the committee will lead to skewed utilization of the fund in favour of the communities that are represented. They have stated that the discriminatory nature offends multiple articles of the Constitution which they have cited.

16. The common stand of the respondents is that whatever their grievances, the petitioners were obligated under the law to address their complaints to the Board before coming to court.

17. Courts have time and again frowned on the practice where litigants ignore a laid down procedure in favour of a constitutional petition to the court. In **International Centre for Policy and Conflict Resolution & 5 others V. Attorney General & 4 others [2013] eKLR** cited in **Geoffrey Kirimi Mathiu & 2 others vs Constituency Development Fund (CDF) & 2 others [2013] eKLR** it was stated:-

“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....”

18. In **Geoffrey Karimi** case above my sister **Lesiit J** in adjudicating a similar case touching a similar provision in **section 49 of the CDF Act 2013** (now repealed) stated with clarity that “the petitioner’s ought to have referred the dispute to the CDF Board as provided for under **section 49 of the Act**. The petitioners were clearly wrong in invoking constitutional provisions since they have not exhausted the dispute resolution mechanism provided for under the Act.” I totally agree with this interpretation of the law which is applicable to the present **Section 56(3) of the NGCDF Act 2015**. In that particular case however, **Lesiit J** nonetheless proceeded to consider the particular circumstances of that case and disposed of the petition.

19. Counsel for the petitioner submitted that they had been rebuffed by the committee and that the 3rd respondent had been evasive thereby forcing them to come to court. He stated that the court had jurisdiction because the petitioners were alleging contravention of various articles of the Constitution including **Article 10 (2)(a)**. He relied on **Midroc Water Drilling Co. Ltd vs. National Water Conservation & Pipeline Corporation [2015] eKLR** for the proposition that the court had jurisdiction to determine a matter despite the existence of alternatives. The petitioners further cited **Oraro Vs. Mbaja [2005] eKLR** for the proposition that a preliminary objection cannot be sustained where there are contested facts as in their case. In the Oraro case **Ojwang J** (as he then was) in dismissing the Preliminary Objection had this to say:-

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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. I am in agreement with learned counsel, **Mr. Mugo**, that “where a Court need to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message.....”

20. I understand the objection raised by the respondents to be on a point of law. The same in my view in no way calls for any explanation or investigation of facts. The facts that are contestable in the present petition are not in the interpretation of **Section 56 (3)** of the **NGCDF Act** but rather on the grievances contained in the petition. The Oraro case cited by the applicant therefore defeats the petitioners’ case.

21. There was no evidence presented by the petitioner to support the submission that they had been rebuffed by the Committee. In any case the law required them to address their grievances to the NGCDF Board and not the committee. The petitioner did not show the court the steps they took to have the matter dealt with in the first instance by the Board. They had that burden to show the court that they had been rebuffed.

22. The 1st Respondent has objected to being enjoined in the petition. A reading of the NGCDF Act however clearly shows that the Fund Manager is an agent of the Board seconded to the Constituency level. Whereas the Board would be the right body to be sued, I would however not strike out the petition on account of the 1st respondent (who is its agent) having been sued.

23. For the 3rd respondent it is argued that he had no role to play in the appointment of the committee members and has therefore been sued wrongly. I agree with the 3rd respondent’s submission on this. The **NGCDF Act 2015** delineated the role of members parliament to an oversight and not executive role. However it is not lost to the court that even in that oversight role, the MP still wields a lot of influence. His participation in the proceedings therefore may not be totally misplaced. I would therefore dismiss the objection as petitioners should in the first instance present the claim before the board.

24. Following the above, it is clear to me that the **Section 56(3) of the National Government Constituency Development Act 2015**, makes it mandatory for the petitioners to make their claim before the Board in the first instance. While I recognize that the court has unlimited original jurisdiction under **Article 165 of the Constitution** as argued by the petitioners, I am persuaded that for orderliness the petitioners should in the first instance present the claim before the Board. Any procedural and substantive issues arising therefrom can then be presented to the court either by way of judicial review or substantive petition.

25. In the end, the preliminary objection succeeds and is upheld. The petition herein and the attendant application are struck out with no order to costs.

Ruling signed at Garsen on 12th day of July 2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 2nd day of August, 2018.

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JANET MULWA

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent