



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 346 OF 2013

UMURIO WARIO.....1ST PLAINTIFF

ABUDO QONCHORO..... 2ND PLAINTIFF

GALGALO WARIO 3RD PLAINTIFF

- V E R S U S -

CONSTITUENCY DEVELOPMENT FUND BOARD.....1ST DEFENDANT

FRANCIS CHACHU GANYA 2ND DEFENDANT

RULING

1) Umuro Wario, Abudo Qonchora and Galgalo Wario, the 1st, 2nd and 3rd plaintiffs respectively filed an action against Constituencies Development Fund Board and Francis Chachu Ganya, the 1st and 2nd defendants respectively vide the plaint dated 23rd August 2013. In the aforesaid plaint, the plaintiffs sought for judgement as follows:

a. A declaration that the defendants did not follow or comply with the mandatory requirements of Act and specifically Section 24 of the Constituency Development Fund Act, 2013 as to the nomination of persons to be members of the Constituency Development Fund Committee.

b. An order directed at the defendants to comply with the mandatory requirements of the Act and specifically Section 24 of the Constituency Development Fund Act, 2013.

c. Costs of this suit.

d. Any other relief that this honourable court may deem fit to grant.

2) The 1st defendant filed a defence to oppose the plaintiffs' suit. It also filed a notice of preliminary objection dated 27.9.2013 arguing that this court lacked jurisdiction to entertain the suit. The defendant too filed the defence dated 14.10.2013 to oppose the plaintiffs' suit.

3) The subject matter of this suit is the 1st defendant's Notice of Preliminary Objection dated 27th September 2013. Learned counsels appearing in this suit recorded a consent order to have the preliminary objection disposed of by written submissions. I have considered the rival written submissions filed by both sides together with the authorities cited. The brief facts of this case are that the plaintiffs filed this action alleging contravention of various statutory procedures by the defendants, specifically Section 24(3)

(a) and (b) of the Constituency Development Fund Act, 2013 (CDF). It is alleged that the defendants disregarded the provisions of Section 24 of the Constituency Development Fund Act, 2013. It is alleged members of the committee were without convening public meetings in each of the elective wards as required under the Act. The plaintiffs have averred that despite demand being made to the 1st defendant and to the cabinet secretary for Devolution and Planning to appoint an arbitrator as stipulated under Section 49 of the C.D.F Act, 2013, the defendants have failed to do so.

4) The 1st defendant has specifically stated *inter alia* that this court lacks jurisdiction to entertain this suit because the plaintiffs have failed to exhaust alternative mechanisms for the resolution of dispute through the channel of arbitration as prescribed under Section 49 of the Constituencies Development Fund Act, 2013. This court was urged to strike out the suit because it was filed in blatant breach of the aforesaid provisions. In response to the above arguments, the plaintiffs stated that the defendants should have filed an application for stay of proceedings under Section 6(1) of the Arbitration Act immediately after entering appearance but the defendants entered appearance and filed their respective defences thus invoking the jurisdiction of this court. It is the submission of the plaintiffs that the defendants having filed their defences in a matter dependent on an agreement providing for an arbitration clause they waived their right to ask for arbitration.

5) The parties to this dispute are in agreement that all disputes arising from the administration or application of the Constituencies Development Fund Act, 2013 shall in the first instance be forwarded to the Board under Section 49 of the Act. It is also agreed that it is only after a party has exhausted the mechanism provided for under the above section that the matter can get its way to court. Section 49 of the Constituency Development Fund Act, 2013 provides as follows that:

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

2. Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.

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.

4. 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, the cabinet secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.

5. 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) I have already set out in brief the sort of claim the plaintiffs are pursuing before this court. They are basically seeking to challenge the procedure and subsequent nomination and gazettelement of persons to be members of the Constituency Development Fund committee of the North Horr Constituency. It is the defendants argument that the plaintiffs did not first refer the dispute or complaint to the Constituency Development Fund Board, the 1st defendant herein, for purposes of arbitration. The question which should be answered is whether or not the plaintiffs complied with the procedure laid out under Section 49 of the Constituency Development Fund Act, 2013 before approaching this court? I have carefully perused the pleadings and documents filed by the parties. Of interest to this court is document no. 11 of the 1st defendant's list of documents dated 27th September 2013. The aforesaid document is the letter dated 19th August 2013 by the 1st defendant addressed to Mungai Kalande & Co. Advocates, the plaintiffs' advocates. The aforesaid letter is in response to letters of complaints received by the 1st defendant on 18.6.2013, 4th July 2013, 22nd July 2013 and 15th August 2013. The contents of the 1st defendant's letter are reproduced as follows:

OUR REF: CDFB/LEGAL/COMP (CDF NOMINATIONS)

NORTH HORR

19th August 2013

VOL 1/44/2013

Mungai Kalande & Company Advocates

Shankardass House

3rd Floor, room 310B

Moi Avenue

P. O. Box 6614-00100

admin@mungaikalande.com

Nairobi, KENYA

Dear Sir,

RE: COMPLAINT AGAINST NORTH HORR CONSTITUENCY DEVELOPMENT FUND COMMITTEE ELECTIONS BY UMURO WARIO AND 11 OTHERS.

Reference is made to your letters MK/CIV/019/13, received at the Board on 18th June, 4th July 22nd July and 15th August 2013.

In response to the issues raised, the CDF Board's Complaints and Arbitration Committee deliberated on the complaints and made the following resolutions.

That there are documents on record indicating, that further to sufficient notice issued elections were carried out in North Horr Constituency. Mobilization of the elections was done through the Provincial Administration and community elders. A high number of the residents of the wards took part in the elections as evidenced by signed minutes and attendance list.

There were five nominees elected from each ward as provided for in Section 24(3) (b) of the CDF Act 2013, and the names of the successful nominees were forwarded to the Fund Account Manager accordingly. The selection of the final eight members of the CFC from the ward nominees by the Member of Parliament was done in consultation with the sub-county administrator and the officer of the Board on 10th May 2013. This was in accordance with Section 24(3) (c) of the CDF Act 2013.

Accordingly, the Board finds that the elections were conducted as per the provisions of Section 24 of the CDF Act and uphold their validity.

The records showing the above information are available at our offices for inspection by pre-arranged appointment during working hours.

Further, please note that Section 49(3) and (4) of the CDF Act 2013 provided that 'parties shall jointly agree on an arbiter if one or both are dissatisfied with the Board's decision on a civil dispute under the Act. Where parties fail to jointly agree, then any or both of them may petition the cabinet secretary to appoint an arbiter, who may appoint an arbiter? The Act further provides that the costs of the said arbitration shall be borne by the parties themselves.

Therefore the import of the said section is that once a decision is rendered by the CDF Board regarding a dispute, a party seeking further redress must jointly agree with the other to enter into arbitration. If such an agreement cannot be reached, then either or both of the parties are to petition the Cabinet Secretary, who may appoint an arbiter to consider and determine the matter. The Act excludes the Board from any further involvement in the dispute resolution process once a decision is rendered on the dispute as per Section 49(2) of the Act.

Kindly advise your clients that the North Horr Constituency Development Fund Committee was gazetted on 4th June 2013. The Board however appreciates your client's continued role in social vigilance and audit of the North Horr Constituency Development Fund.

CLARAH KIMELI, LEGAL OFFICER

FOR: AG CHIEF EXECUTIVE OFFICER

Copied to Eng. Peter O. Mangiti

Principal Secretary

State Department of Planning

Ministry of Planning and Devolution

P. O. Box 3005-00100

NAIROBI

The Fund Account Manager

North Horr Constituency Development Fund Committee

North Horr Constituency

P. O. Box 162-60500,

Marsabit

7) The aforesaid letter expressly states that the Constituency Development Fund Board's complaints and arbitration committee deliberated on the complaints and simply dismissed the same. The 1st defendant further opined in the aforesaid letter that the Constituency Development Fund Act 2013 excludes the Board from any further involvement in the dispute resolution process once a decision is rendered on the dispute as per Section 49(2) of the Act. In my view, it cannot lie in the mouth of the 1st defendant to plead and submit that the plaintiffs did not follow the procedure laid under Section 49 of Constituency Development Fund Act, 2013 before filing this suit.

8) The plaintiffs may not have fully complied with the provisions of Section 49 of the Constituency Development Fund by failing to request the cabinet secretary, Devolution to appoint an arbitrator. The letter I have just referred to was in fact copied to the principal secretary, state department of planning and devolution. It would appear the letter was never acted upon by the cabinet secretary despite having knowledge of the simmering dispute. I have analysed the contents of the letter to show that the plaintiffs attempted to adhere to the procedure provided for under Section 49 of the Constituency Development Fund Act, 2013.

9) In the end, I find that this suit is properly before this court. The 1st defendant's Notice of preliminary objection is found to be without merit. The same is dismissed with costs to the plaintiffs.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant