



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NUMBER 288 OF 2014

JULIUS WATUKA WAMBUA. PLAINTIFF

VERSUS

FRANCIS MWANIA. 1ST DEFENDANT

ESTHER MBWIKA. 2ND DEFENDANT

ANN NDUKU MUTUKU. 3RD DEFENDANT

RULING

This is a ruling to a Preliminary Objection dated 24th October, 2014. The objection has been raised by the Defendants and the same is premised on the fact that this Honourable Court lacks the necessary jurisdiction to hear and determine the matter in dispute under Section 49 of the Constituencies Development Act 2013.

The Plaintiff in this matter filed a plaint on the 15th day of September, 2014 seeking the following orders.

- a. A permanent injunction do issue restraining the Defendants from interfering with project “**Ngome ya Kyamwimbu**”.
- b. An Order that the Plaintiff be paid a sum of Ksh.96,750/- being costs of the soil taken from the land, 25 bags of cement taken by Defendants and Ksh.20,000/- from the Constituency Development Fund.
- c. Costs of the suit.
- d. Any further relief that this Honourable Court may deem fit.

The Plaintiff in his plaint pleaded that he is jointly registered owner of Plot No. 102 at Mumandu, Kalama, Machakos together with the Defendants herein on which piece of land they are engaged in a project entitled “**Ngome ya Kwamwimbu**” in which they are building gabions.

The gabions which are six in number are to be built along the Plaintiff’s portion of the land and to ensure the project went on smoothly, they had set rules and regulations as hereunder: -

1. Any member corrupting and disturbing the group will be disqualified.
2. The owners of the land should be committee members.

3. No one will be allowed to sell the sand anyhow in the name of public utility.

The Plaintiff avers that in contravening of the above rules, the Defendants sold soil from the gabion for Ksh.58,000/-, they also made away with 20 bags of cement and Ksh.20,000/- out of Ksh.100,000/- given to them through the Plaintiff signing the Constituency Development Forms.

In their joint defence filed on the 27th October, 2014, the Defendants avers that the subject matter of the Plaintiff's claim is a dispute and/or complaint against the Defendants relating to the administration and management of a project under the Constituency Development Fund which dispute or complaint should be forwarded to the Constituency Development Fund Board in the first instance and as such the court lacks jurisdiction to entertain the dispute in the first instance.

The Defendant avers that the Plaintiff has not invoked and/or exhausted the Dispute resolution mechanism provided for under the Constituencies Development Fund Act.

It is also their defence that on or about May, 2010, the Machakos Town Constituency Development Fund approved the construction of the Kyamuthinza sub-surface dam water project along Kyamwimbu seasonal stream in Kyamwimbu Village, Lumbwa Location, Machakos Constituency, Machakos County. Following the approval and funding to the tune of Ksh.100,000/- the registered owners of the land including the Plaintiff gave the requisite consent to the construction of the project and on 25th August, 2013 a resolution was passed that sand could be harvested from the project for sale for the benefit of the local residents.

The Defendants avers that neither the Plaintiff nor themselves are the registered owners of any land by description Plot 102 at Mumandu/Kalama, Machakos but pleads that the 1st Defendant and the Plaintiff are however, beneficiaries of the land known as Kalama/Mumandu/1802 registered in the name of Wambua Mwikya Kiatine, the father to the 1st Defendant, now deceased, while the 2nd and 3rd Defendants are beneficiaries of the project by virtue of being local residents of the area in which the project is situated.

The Defendants pleads that the monies demanded by the Plaintiff emanate from a project by Machakos Town Constituency Development Fund and the cement demanded by him was from the same fund.

The preliminary objection was canvassed by way of written submissions.

In his submissions counsel for the Defendants argued that the subject matter of the suit relates to Constituency Development Fund which is governed by Constituency Development Act, 2013, a fact, which is admitted by the Plaintiff in paragraph 9(a) and (b) of the amended plaint. He based his objection on Section 49 of the CDF Act which provides that disputes of a civil nature should be referred to the CDF Board before the matter can be referred to court.

On his part, Counsel for the Plaintiff submitted that the Plaintiff has not made admission that the subject matter of the suit relates to Constituency Development Fund as alleged by the counsel for the Defendants.

He further told the court that the project was not approved by the Chairman of the CDF Fund Committee and for that reason, the project, subject matter herein is not a CDF Project and that the Plaintiff refers to a different project namely Ngome ya Kyamwimbu and not the Kyamuthinza Sub-surface Dam Water Project.

I have considered the depositions and the submissions by the learned counsels. I have also looked at the list of authorities filed in the case.

The issue this court will have to determine is whether the project the subject matter of the suit herein is a CDF Project and if so, whether the Plaintiff has contravened the Provision of Section 49 of the CDF Act by filing the suit herein in court before referring the dispute to the CDF Board.

The Constituency Development fund is established under Section 4 of the Constituencies Development Fund Act (Act No. 10 of 2003) herein referred to as “**the Act.**”

The Constituency Development Committee is established under Section 23 of the Act and is charged with the responsibility of among others, allocation and distribution of money to various projects in the constituency and its headed by the Chairperson who is the local Member of Parliament.

The Plaintiff’s case revolves around the allegations of misappropriation of CDF funds by the Defendants. The Plaintiff in his amended plaint paragraphs 9(a) and (b) and prayer 2 of the same refers to monies that the project received from the Constituency Development Fund.

As I have pointed out the Constituency Development Committee is charged with the responsibility of among others allocating and distributing money to various projects in the constituency. The Plaintiff has admitted some Ksh.100,000/- was given to the project by the fund and he claims part of that money from the Defendants.

Though the Plaintiff claims that the project which the Defendants refers to is different from the project he refers to in the amended plaint, the parties agree in principle that they are engaged in a common project funded by the CDF, by whatever name called.

In the circumstances aforesaid, the dispute lies squarely within the provision of CDF Act and in particular Section 49 thereof, which is couched in mandatory terms and has no exceptions and/or provision. In view of this provision and there being no evidence that the Plaintiff exhausted these remedies, in bringing this suit the Plaintiff has avoided the procedure and the remedy provided for under the Act.

It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the Constitution. Indeed such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provision would be rendered otiose.

I am satisfied that the Plaintiff has not invoked the dispute settlement procedure provided for in the act and I hereby allow the Preliminary Objection and strike out the Plaint with no orders as to costs.

Dated, signed and delivered at Nairobi this 29th day of January, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... for the Plaintiff

..... for the Defendant