



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

ELC CASE NO.22 OF 2013

SHEM OBUOCH KOWUOR.....1ST RESPONDENT/PLAINTIFF

**WALTER OWUOR SIGU.....2ND
RESPONDENT/PLAINTIFF**

VERSUS

**THE CONSTITUENCY DEVELOPMENT FUND BOARD.....APPLICANT
/DEFENDANT**

RULING

1. **The Constituency Development Fund Board**, Applicant, by Notice of Motion dated 21st January 2015 prays for the plaint failed on 4th January 2013 to be struck out for lack of jurisdiction and costs. The application is based on the three grounds marked (a) to (c) on the Notice of Motion and affidavit of **Simon Ndweka**, the Applicant's Company Secretary, sworn on 21st January 2015. The main thrust in both the grounds and the affidavit is that this suit was filed in court prematurely without first pursuing the claim through arbitration in accordance with section 49 of the Constituency Development Act 2013.
2. The application is opposed by **Shem Obuochi Kowuor and Walter Owuor Sigu**, the Respondents, through the grounds of opposition dated 4th May 2015 filed through their counsel on five grounds marked 1 to 5. In summary the Respondents grounds are that the court has jurisdiction in accordance with Section 13 and 150 of the Environment and Land Court Act No.19 of 2011 and Section 128 of the Land Act No.6 of 2012. Secondly that the Respondents had issued the Applicants with notice under Section 49 of the CDF Act and todate the Applicant has failed to comply with Section 51 (1) and (2) of the said Act.
3. That on 4th May 2015, the parties counsel consented to file written submissions on the application. The Applicant filed their submissions dated 9th June 2015 on the same date while the Respondents filed theirs dated 12th October 2015 on the 22nd October 2015.
4. The issues for determination by the court are as follows:
 - (a) Whether the Respondent had referred the matter to the Constituencies Development Fund Board for arbitration in accordance with Section 49 of the Constituency Development Fund Act 2013 before filing this suit.
 - (b) Whether this suit should be struck out and if so who pays the costs.

5. The court has carefully considered the grounds on the Notice of Motion, grounds of opposition, affidavit evidence and submissions by counsel and found as follows:

(a) That as restated by the superior courts in several cases, this court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution 2010 and the provisions of the Environment and Land Court Act or any other law applicable in Kenya relating to environment and land. See **John Nakhabi Okelo – V- Obura Nelson** [2013] ECLR. The courts have however taken the position that, where the applicable legislative framework has a clear procedure for seeking redress, then that procedure should be strictly adhered to before a litigant can knock on the door of this court. See **International Centre for Policy and Conflict & 5 others -V- The Attorney General & 4 Others** [2013] eCLR, **James Kariuki Kaguora -V- Eng. John Kirago Chege & 2 Others** [2013] eCLR and **Wilson Wachira Ngunjiri & another – V – Ol'jorok Constituency Development Fund Committee & 3 Others** [2014] eCLR.

(b) That the Applicant deposition that unless the provision of Section 49 of the Constituency Development Fund Act 2013 are complied with, the plaint is incompetent and an abuse of the courts process and should therefore be struck out has not been challenged. The court is of the considered view that had the Respondents moved the Applicant for an arbitration process in accordance with Section 49 of the Act before filing this suit, then the Respondents would have sworn an affidavit providing documentary evidence of the process taken. No such evidence has been availed.

(c) That the Applicant's position that the Respondents needed to have taken up their grievances with the Board in accordance with Section 49 of the Act in line with the provision of Article 159 (2) (c) of the Constitution 2010 is reasonable and justiciable.

The relevant part of the Article states;

" 159. (1)

(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles

(a)

(b)

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms shall be promoted, subject to clause (3); "

The respondents suit was filed in court prematurely and they should therefore lodge their grievance with the Board in accordance with Section 49 of the said Act.

(d) That the constituency Development Fund Act 2013 though declared unconstitutional and invalid by the Constitution and Human Rights Division in the Case of **The Institute of Social accountability & Another – V- the National Assembly & 4others in Milimani Petition No.71 of 2013** on 20th February 2015, the court suspended invalidity order for 12 months. The 12 (twelve) months are yet to expire and the Act is therefore still valid.

(e) That for reasons set out above, the court find that the Respondents invoked this courts jurisdiction prematurely. The Notice of Motion dated 21st January 2015 has merit and the plaint dated 4th January 2013 and filed in court on 30th January 2013 is hereby struck out with each party bearing their own costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **28th day of January 2016**

In presence of;

APPLICANT N/A

RESPONDENTS N/A

COUNSEL Mr Yogo for the Applicant.

 Mr Anyul for the Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/1/2016

28/1/2016

SMKibunja J

Oyugi court clerk

Parties absent

Mr Yogo for the Applicant.

Mr Anyul for the Respondent.

Court: Ruling delivered in open court in presence of Mr Yogo for the Applicant and

Mr Anyul for the Respondents.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/1/2016