



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSTITUTIONAL PETITION NO 6 OF 2014

1. PHYLIS WANJIRU MAINA

2. PATRICK KARANGU NJERI

3. PETER G NJOROGE.....PETITIONERS

VERSUS

1. CONSTITUENCY DEV FUND COMMITTEE, GATANGA CONSTITUENCY

2. CONSTITUENCY FUND MANAGER, GATANGA

3. CONSTITUENCY DEV FUND BOARD

4. HUMPHREY KIMANI NJUGUNA.....RESPONDENTS

R U L I N G

1. The Petitioners in this petition have posed the following questions (suitably rephrased) for determination by the court -

- i. Whether the Constitution of Kenya, 2010 applies at “Constituency level”?
- ii. Whether Article 35(3) of the Constitution “extends to other bodies and institutions within the state acting in the public interest”?
- iii. Whether “having failed in their mandate the 1st and 3rd Respondents are suitable to continue serving in their respective capacities as far as the CDF management in Gatanga is concerned”?
- iv. Whether by dint of Article 99(2) (h) as read together with Article 103(1)(9) of the Constitution, “and having failed in his mandate to patronize in the wider interests of his, and his failure to discharge his constitutional duty to uphold the principles of openness and accountability”, the 4th Respondent is suitable to continue serving as Member of Parliament for Gatanga Constituency “and should consequently lose his seat”?
- v. Whether by dint of Article 99(2) (h) as read with Article 103(1) (g) of the Constitution, “and having failed in his mandate to protect the interests of his electorate by jealously guarding the CDF management from negative influence, and having orchestrated a culture of lawless and open bias”, the 4th Respondent is suitable to continue serving as an *ex officio* member of the CDF Committee, Gatanga Constituency.

vi. Whether “the 3rd Respondent’s policing mechanisms are adequate”.

2. The specific main reliefs sought in the petition are –

- a. A “mandatory order” to compel the 2nd Respondent to furnish the Petitioners with information regarding the 1st Respondent”.
- b. A declaration that Article 35(3) of the Constitution “extends to other bodies and institutions within the state acting in the public interest”.
- c. A “mandatory order” to compel the Director of Public Prosecutions “to investigate the 1st and 4th Respondents, once found culpable in regard to this petition”.
- d. A “mandatory order” to disband the 1st Respondent.
- e. A declaration that the “current members” of the 1st Respondent, including the 4th Respondent, are unfit to hold public office.
- f. A declaration that the 4th Respondent is unsuitable to continue serving as an *ex officio* member of the CDF Committee, Gatanga Constituency.
- g. A declaration that the 4th Respondent is unsuitable to continue serving as the MP for Gatanga Constituency, and a resultant further declaration that the office was thus vacant.

3. The 2nd, 3rd and 4th Respondents have filed papers in response to the petition. The 1st Respondent has not. Among the responses filed by the 2nd and 3rd Respondents is a **notice of preliminary objection dated 03/06/2014**. The single point of law taken up in that notice is that –

“...this suit has been instituted in clear disregard of, and offends the provisions of, section 49 of the ***Constituency Development Fund Act, 2013***, and as a consequence this court lacks jurisdiction to entertain the same.”

That preliminary objection is the subject of this ruling.

4. The 2nd and 3rd Respondents, and the Petitioners, chose to file written submissions in respect to the preliminary objection. The 4th Respondent supported the preliminary objection.

5. The 2nd and 3rd Respondents’ submissions were filed on 08/12/2014 while those of the Petitioners were filed on 03/11/2015. The parties highlighted those submissions on 23/02/2016. I have considered the submissions, together with the authorities cited. I have also read through the petition and supporting documents as well as the responses filed by the 2nd, 3rd and 4th Respondents. It is plain that the Petitioners’ complaints in this petition relate to the management of Gatanga Constituency Development Fund. But over and above the complaints is the specific complaint that the Petitioner’s right of access to information under Article 35(3) of the Constitution has been violated. There is also the complaint that the 4th Respondent should be disqualified from eligibility to hold the office of Member of Parliament under Article 99(2) (h) as read with Article 103(1) (g) of the Constitution.

6. The Petitioners’ complaints thus raise issues of interpretation and application of certain constitutional provisions, notwithstanding that these complaints emanate from their dissatisfaction with the way the Gatanga CDF is run.

7. **Section 49** of the Constituencies Development Fund Act, 2013 states as follows-

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

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

(iii) 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.

(iv) 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.

(v) 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.

8. Constitutional issues cannot be included in the definition of “disputes of a civil nature” which the *Constituencies Development Fund Board* established under **section 5** of the Act or an arbitration panel may deal with in the first instance. Those are issues specifically reserved for the courts by the Constitution. I agree that not all suits clothed in constitutional terms necessarily raise constitutional issues to engage the court. In the instant petition, however, I am satisfied that constitutional issues have been raised that ought to be canvassed before, and decided by, this court.

9. In the event, the preliminary objection by the 2nd and 3rd Respondents is overruled. Costs thereof shall be in the cause.

DATED, SIGNED AT MURANG'A THIS 28TH DAY OF APRIL 2016

H P G WAWERU

JUDGE

DELIVERED AT MURNG'A THIS 29TH DAY OF APRIL 2016