



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

PETITION NO. 8 OF 2015

(Formerly Kisumu E&LR Petition No. 2 of 2015 and Homa Bay High Court Petition No. 2 of 2015)

IN THE MATTER OF : ARTICLES 20(1), 21(1), 22(1), 28, 41(1) 47(2), 50(1) & 165 OF THE
CONSTITUTION , 2010

AND

IN THE MATTER OF : CONSTITUTION AND/OR INFRINGEMENT OF THE FUNDAMENTAL
RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF : CONSTITUE NCY DEVELOPMENT FUND ACT, 2013

BETWEEN

SILAS OWITI MASAWA.....PETITIONER

VERSUS

ANNE MIKOYO.....1ST RESPONDENT

PETER NYAGILO.....2ND RESPONDENT

HAMES JUMA.....3RD RESPONDENT

PHILIP OSICHO.....4TH RESPONDENT

OLIVER ODETE.....5TH RESPONDENT

JULITA ODERA.....6TH RESPONDENT

RONALD INGILA.....7TH RESPONDENT

AND

THE CONSTITUTION DEVELOPMENT

RULING

1. The Petitioner filed the Petition dated 21/01/2015 before the Employment and Labour Relations Court at Kisumu challenging his removal from the Chairmanship and membership of the Awendo Constituency Development Fund Committee. He sought several declarations, injunctions as well as costs.

2. Together with the Petition was the Notice of Motion evenly dated whose effect was to restore the Petitioner back into the office and to restrain the Respondents herein from interfering with the discharge of his lawful mandate as the Chairman and member of the Awendo Constituency Development Fund Committee.

3. In a rejoinder, the Respondents and the Interested Party filed a Preliminary Objection on 10/02/2015 in which they challenged the jurisdiction of the court in the following manner: -

1. This court lacks jurisdiction to entertain the present claim regard being to Article 162 of the Constitution of Kenya.

2. The jurisdiction is ousted by the provision of Section 49 of the Constituencies Development Fund Act 2013.

3. The application and the petition offend the mandatory provisions of the Employment Act and the Industrial Court Act

4. The objection in respect to the jurisdiction of the Employment and Labour Relations Court was argued before Hon. Lady Justice Maureen Onyango who by a ruling rendered on 19/03/2015 upheld the objection and transferred the matter to the High Court at Homa Bay. But since the matter in issue involve the Awendo Constituency Development Fund Committee which is in essence within the Migori County of the Republic of Kenya, the Petition was eventually transferred to this station from the High Court at Homa Bay.

5. Upon directions issued on 24/02/2016, parties were to address this Court on whether it also has the jurisdiction in view of the second limb of the preliminary objection. Whereas the Respondents and the Interested Party filed and relied on written submissions, the Petitioner instead tendered oral submissions on the issue.

6. It was the Respondents' and the Interested Party's contention that this Court also lacks the jurisdiction to in anyway deal with the Petition as well as the application or at all by dint of **Section 49** of the Constituency Development Fund Act, 2013 (hereinafter referred to as "**the Act**"). They jointly submitted that the dispute ought to have instead been referred to the Constituency Development Fund Board for adjudication and in the unlikely event a party remained dissatisfied thereafter such a party would elect to approach this Court for further possible remedies. This Court was urged to note that the wording of the said **Section 49 of the Act** was in mandatory terms and it referred to all possible disputes including the one before Court. They relied on the persuasive decisions in **Bungoma High Court Civil Case No. 18 of 2014 (unreported)** and **Kisumu High Court Civil Case No. 21 of 2013 (unrepeated)** for that proposition. They prayed that the Petition as well as the application be struck out with costs.

7. The Petitioner on the other hand was of the contrary view. To him this Court is vested with the requisite jurisdiction to deal with the matter. Counsel for the Petitioner fronted several reasons in support of the said position. **First**, it was argued that the Act, which was later on declared unconstitutional, did not provide for the procedure for the removal of a Chairperson of a Constituency Development Fund Committee once appointed and as such once appointed, the Chairperson was deemed to serve for the entire period. **Second**, it was argued that the issue of the removal the Chairperson was not among the disputes contemplated under Section 49 of the Act as it fell outside that legal provision. He relied on the persuasive decision in **Republic -vs- Arnord Karani Njiru – Fund Account Manager, Laikipia East**

Constituency Fund & 10 others exparte Amin Mohamed Ali (2015) eKLR for that proposition. To him, the Petition does not deal with the administration of the Act but on an improper removal of a Chairperson which falls outside the confines of the law in issue. **Third**, it was the Petitioner's contention that when he was suspended from office in the first instance he lodged a complaint with the Constituency Development Fund Board (hereinafter referred to as **“the Board”**) and the decision by the Respondents to suspend him from the Chairmanship of the Awendo Constituency Development Fund Committee (hereinafter referred to as **“the Committee”**) was reversed. As a result of the decision by the Board the Petitioner resumed the Chairmanship of the Committee. Unlike the first time, the Respondents then instituted a process towards removing the Petitioner from both the Chairmanship and membership of the Committee. Upon the Respondents completing the removal process, the Petitioner again lodged a complaint with the Board. That was vide the Petitioner's letter dated '21/08/2014'. However to the Petitioner's utter shock and surprise the Board never acted on the matter and that is why he decided to instead file a Constitutional Petition challenging the infringement of his rights under **Articles 22 and 27 of the Constitution**. The Petitioner argued further that his right to access the High Court remain unimpeded by dint of **Articles 22 and 258 of the Constitution** and that the Petitioner was challenging his right to a legitimate expectation which was outside the confines of Section 49 of the Act. The Petitioner further submitted that his Petition was hinged on **Articles 2(2), 10(1) and 47(2) of the Constitution** which are also way out of the confines of Section 49 of the Act. The Petitioner further contended that it will amount to gross injustice if the Petitioner was to be left without a remedy given that the Board had declined to deal with the complaint he had lodged with it. That therefore called for the provisions of **Article 23 of the Constitution** to fill the vacuum since no wrong can be without a remedy.

8. Responding to the judicial decisions relied upon by the Respondents and the Interested Party, the Petitioner distinguished them by arguing that the same arose from ordinary civil suits whose parameters were restricted unlike the case in constitutional petitions and that they were rendered before the Act was declared unconstitutional. The Petitioner went on to argue that the decisions, unlike in the present case, did not deal with a situation where a complaint had been lodged under Section 49 of the Act but the Board declined to act on it. The Petitioner then urged this Court to disregard the decisions and to accordingly dismiss the objection so as to pave way to the determination of the Petition on its merit.

9. The foregone then led to this ruling.

10. As the issue under consideration was raised by way of a preliminary objection, it will be in order for us to have a look at the law on preliminary objections. Law, J.A. in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”

11. My brother Mwita, J. in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in more clearer terms when he stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

12. Before I leave this discourse, my attention has been drawn to the words of Hon. Ojwang, J (as he then was) in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, J.A. in the **Mukisa Biscuits case (supra)** went on to stay that: -

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a Preliminary point...”

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

13. It is on the basis of the foregone clear legal position that the Respondents and the Interested Party raised the preliminary objection on the jurisdiction of this Court. This Court remains clear in its mind that jurisdiction is everything and without it a Court cannot make any more single legal step. Once the jurisdiction of a Court is challenged, that Court must first determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. In the famous case of **The Owners of Motor Vessel “LILIAN “S” -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** Nyarangi, JA. stated at page 14 that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:-

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

14. Turning to the matter at hand, since the jurisdiction of the Court has been opposed to by dint of Section 49 of the Act, it is prudent to reproduce the said section for clarity purposes. The said **Section 49** of the Act states 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 unlawful action taken in his official capacity or for any disputes against the

Fund.

15. Before I deal with the issue as to whether or not this Court has the jurisdiction to deal with the matter, I wish to revisit the brief legal history of the Constituency Development Fund (hereinafter referred to as '***the Fund***') in Kenya. The Fund was started sometimes in 2003 when the Constituency Development Fund Act No. 10 of 2003 was assented into law on 31/12/2003. Ten years later, the 2003 Act was repealed and the Constituency Development Fund Act No. 30 of 2013 (the Act) came into being. This Act was then amended through the Constituencies Development Fund (Amendment) Act No. 30 of 2013 so as to align it with the Constitution of Kenya, 2010.

16. The Act was then challenged in Petition No. 71 of 2013 in the High Court of Kenya at Nairobi and a three-judge bench later on rendered its judgment on 20/02/2015 where it held that several sections of the Act (but not including Section 49 thereof) were unconstitutional and since those sections of the Act could not be reasonably severed from the Act, the whole Act was declared unconstitutional and its invalidity suspended for one year so as to pave way to either a new legislation or appropriate amendments. That was the case which is reported as ***Institute of Social Accountability and Another versus National Assembly & 4 others (2015) eKLR.***

17. As a result of the above decision, the National Assembly came up with the National Government Constituency Development Fund Act No. 30 of 2015 (hereinafter referred to as "***the 2015 Act***") which was eventually signed into law in December 2015.

18. The 2015 Act also provided for a mechanism for the resolution of disputes under **Section 56** thereof. That section is a replica of Section 49 of the Act.

19. With that brief background, let us now get back to the issue at hand. I have carefully considered the Petition, the Notice of Motion dated 21/01/2015, the Preliminary Objection, the submissions as well as the judicial decisions tendered and referred to by Counsels. I must say that I am very grateful to the Counsels for the industry and learning they put into this matter. There is indeed a consensus that the dispute in this matter relate to the removal of the Petitioner from the Chairmanship and membership of the Committee. It is also not in dispute that when the Petitioner was so removed he lodged a complaint with the Board and upon realising that the Board was not intent on dealing with the complaint the Petitioner then approached this Court by way of a Constitutional Petition alleging violation of his constitutional rights and that attracted the objection at hand.

20. The Board is established under **Section 6 of the Act** and has the following mandate:-

“6.(1) The functions of the Board shall be:-

(a) to ensure timely and efficient disbursement of funds to every constituencies;

(b) to ensure efficient management of the fund;

(c) to receive and discuss annual reports and returns from the constituencies;

(d) ensure the compliance of proper records, returns and reports from the constituencies;

(e) receive and address complains and disputes and take any appropriate action.

(f) consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;

(g) perform any other duties as the Board may deem necessary from time to time for the proper management of the Fund.

21. The law is therefore clear that one of the functions of the Board is to **receive and address** complaints and disputes in respect of all the disputes arising from the administration of the Act in the first instance and before such disputes find their way otherwise. That therefore means that the first point of call for such disputes is at the Board. The law further gives the Board very clear directions in respect to the said disputes; not only to receive but to also address those disputes by **taking appropriate action**. One of the actions the Board can take is to refer a dispute to the relevant government agency(ies) charged with prosecutorial powers in the event the Board forms the view that the complaint is criminal in nature. The Board can also proceed to determine the complaint or dispute with or without recourse to arbitration. For instance when the Petitioner complained about his suspension from the Committee, the Board dealt with the matter without recourse to arbitration.

22. However the Board can only exercise such mandate over disputes **'arising due to the administration of the Act'**. That therefore leads me to ascertain whether or not the dispute between the Petitioner and the Respondents arose due to the administration of the Act. The term '**administration**' has been defined by the Law Dictionary as follows:-

“In public law. The administration of governance means the practical management and directions of the executive department or of the public machinery or functions, or of the operations of the various organs of the sovereign. The term “administration” is conveniently applied to the whole class of public functionaries, or those in charge of the management of the executive department. People vs. Salisbury – 134 Mich 537, 90 N. W. 930.”

23. Borrowing from the above definition and looking at the structure of the Committee both under the Act and the 2015 Act, it is clear that the Committee is but an arm of the Board. I say so because **Section 6(1)(f) of the Act** provides that one of the main functions of the Board is to **'consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects'**. In ensuring that all the Committees in each constituency in Kenya operates within the Act, the Board is in effect ensuring the effective administration of the Fund as so required of it under **Section 6(1)(b) of the Act**.

24. Under both the Act and the 2015 Act, the Board deals with the practical and day-to-day management of all the affairs of the Fund. In other words, the Board discharges the executive functions in respect to the Fund and therefore deals with the administration of the Act. Since the Committee derives life from the Board, it can only be said that the Committee likewise deals with the administration of the Act and any disputes or complaints arising from the Committee dealings and activities equally arise from the administration of the Act. For clarity purposes therefore this Court finds that the dispute between the Petitioner and the Respondent in this matter arises from the administration of the Act and as such it is among those contemplated under Section 49 of the Act.

25. Having so found, the question which now begs an answer is whether this Court is still possessed of the jurisdiction to deal with the matter. Courts in our jurisdiction have had occasions to consider similar circumstances in which parties have sought to bypass the dispute resolution mechanisms provided by statutes and to instead approach the Courts by way of Constitutional Petitions. In the case of **Speaker of the National Assembly -vs- Karume (2008) 1 KLR (EP) 425**, the Court of Appeal expressed itself as follows:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.”

26. In the case of **Geofrey Kirimi Imathiu & 2 others v. Constituency Development Fund CDF Board & 8 others (2013) eKLR**, Lesiit, J in considering the effect of Section 49 of the Act just like in the instant case went into great detail in examining various decisions and ended up expressing herself as follows: -

"16. I have considered persuasive cases. In the case of PETER OCHARA ANAM &

OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND CDF BOARD & OTHERS KISII PETITION NO.3 OF 2010 (2011) eKLR, Hon Mr. Justice Makhandia, as he then was stated as follows:

“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. 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 provisions would be rendered otiose...”

17. In the case of STANLEY MUNGATHIA DAUDI & 4 OTHERS –V- HON CYPRIAN KUBAI KIRINGO & 3 OTHERS MERU HIGH COURT PETITION NO. 5 OF 2013, Makau J as he then was had this to say with regard to section 49 of the CDF Act 2013:

“The section herein above is not a formality but is mandatory. A petitioner cannot be heard to say he has come to court by way of a constitutional reference with a view to oust a specific provision of a statute. The petitioner is obliged to just exhaust all the remedy as laid down in the respective statute before bringing up a petition to the High Court. A petitioner has no choice but to comply with the specifically spelled out procedure and pursue his remedy accordingly. He cannot be heard to hide behind the constitutional provisions.”

18. The High Court faced with a similar situation in the case INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2013) EKLR as referred to in the case of DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (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 or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of the constitution. Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.....”

27. I have also come across several other decisions in which Courts have reiterated the above position. They include the unreported cases of **Nairobi High Court Petition No. 258 of 2013 James Kariuki Kaguora vs. Eng. John Kiragu Chege & others, Philip Omodi Ogolla vs. Hon. John Olago Oluoch (supra), Emmanuel W. Ouma vs. Christine Muyoka & others (supra)** and the reported case of **George Morara Manyara vs. Hon. Maina Kamanda & 3 others (2014) eKLR** among many others.

28. This Court has carefully and deeply considered the law and the matter at hand and hereby adds its voice to the position that it is true the Constitution protects the Petitioner's rights under the Bill of Rights and it is also true that those rights are enforceable under **Article 22** of the Constitution and further that the Petitioner has a right to access this Court under **Article 22** and even under **Article 258** when the Petitioner thinks that there is a threat to the Constitution. However under **Article 159(2)(c)**, the Constitution gives emphasis to and calls upon parties to disputes to endeavour and submit to alternative disputes resolution mechanisms. Therefore despite this Court's wide jurisdiction bestowed on it by the Constitution if it were to assume jurisdiction and deal with matters meant for the Board then the Board,

which is a creature of the law, would be rendered useless. Certainly that cannot be said to have been the intention of the Constitution. I hence find that this is a perfect case where this Court has to give way to the Board to first exercise its jurisdiction.

29. In buttressing the above position in this particular case I wish to briefly refer to the conduct of the Petitioner in the matter. It is on record that when the Petitioner was first suspended from the Committee he sought the intervention of the Board and the matter ended well for him. When the Committee revisited the matter and removed the Petitioner from both the Chairmanship and membership of the Committee, the Petitioner again sought the intervention of the Board. He did so by lodging a formal complaint to the Board vide his letter erroneously dated **21/08/2014** but it was **28/08/2014**. I have perused the letter and it confirms that it was received by the Board on 05/09/2014. The Petitioner then goes ahead to say that he decided to come to this Court since the Board had gone quiet over the complaint he lodged with it and moreso given that there can be no wrong without a remedy.

30. It is very clear that the Petitioner submitted himself to Section 49 of the Act in both instances that is when he was first suspended from the Chairmanship of the Committee and in the other instance when he was removed from both the Chairmanship as well as the membership of the Committee. In doing so the Petitioner rightly so knew that the Board had the requisite mandate and jurisdiction to deal with the disputes. Having done so the Petitioner cannot now be heard to say that the remedies he is now seeking in Court are outside the ambit of the Board. What the Petitioner want is to be reinstated to the Chairmanship and the membership of the Committee. Obviously that is a matter which the Board has powers to deal with and grant an appropriate remedy.

31. On the contention that the Board had refused to deal with the Petitioner's dispute hence the recourse to this Court, it is this Court's position that in such a scenario the Petitioner may actually approach the High Court but not in the manner he did. He may instead seek orders to compel the Board to deal with the complaint but not to ask this Court to grant what is squarely in the domain of the Board.

32. As I come to the end of this ruling, the Petitioner ought to be rest assured that the Board in dealing with any dispute before it cannot purport to keep the Constitution in its back-pocket. It is called by the very Constitution to apply the national values and principles of governance as set out therein as well as the Bill of Rights. In reaching its decision the Board is mandated to uphold and effect the rights and fundamental freedoms of all the parties before it.

33. The upshot of the above discourse is that the Preliminary Objection dated 10/02/2015 by the Respondents and the Interested Party succeeds to the extent that this Court's jurisdiction in dealing with the Petition has been ousted by **Section 49** of the Act (which is **Section 56** of the 2015 Act).

34. The Petition and the Notice of Motion evenly dated 21/01/2015 be and are hereby struck out with costs.

Orders accordingly.

DELIVERED,DATED and SIGNED at MIGORI this 19THday of APRIL 2016.

A. C. MRIMA

JUDGE