



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.38 OF 2014

**IN THE MATTER OF ARTICLES 1,10(2), 19, 20(1), 22(1), 233, 25, 258 OF THE
CONSTITUTION, 2010**

AND

IN THE MATTER OF VIOLATION OF THE CONSTITUTION 2010

AND

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL AND
CONSTITUTIONAL RIGHTS**

AND

IN THE MATTER OF THE CONSTITUENCY DEVELOPMENT FUND ACT, 2013

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005

AND

IN THE MATTER OF NYARIBARI CHACHE CONSTITUENCY

AND

**IN THE MATTER OF ARBITRARY AND INDISCRIMINATE ALLOCATION/USAGE
OF CDF FUNDS**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
& FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

ELIJAH MWAMBA JUMA

JOSHUA NYAKONI NYABENGI.....PETITIONERS/

APPLICANTS

VERSUS

**THE FUNDS ACCOUNTS MANAGER, NYARIBARI CHACHE
CONSTITUENCY**

**CONSTITUENCY DEVELOPMENT COMMITTEE, NYARIBARI CHACHE
CONSTITUENCY**

THE CONSTITUENCY DEVELOPMENT FUND BOARD

HON. RICHARD NYAGAKA TONGI
RESPONDENTS

RULING

By a petition dated 3rd November 2014 brought under **Articles 1, 10(2), 19, 20(1), 22(1), 23, 35 & 258** of the **Constitution of Kenya 2010**, the petitioners herein filed this petition against the respondents herein in which they alleged that the 3rd respondent had abdicated her statutory mandate and or jurisdiction, which consequently contributed to the misuse, misappropriation and pilferage of the Constituency Development Funds meant for Nyaribari Chache Constituency.

The particulars of abdication and or dereliction of duty were indicated as follows:-

- a. *Failing to follow up and ensure compliance.*
- b. *Allowing the 1st and 2nd respondents to manipulate the disbursement of funds and thereby deny duly approved projects funding.*
- c. *Failing to follow up and or investigate complaints or misuse of funds.*
- d. *Conriving and or colluding with the rest of the respondents to facilitate pilforage.*
- e. *Employing and or engaging unqualified Funds Accounts Manager.*
- f. *Disbursing funds in respect of non-existent/ghost development project including Kisii Township Dispensary, Nyang'eni, Nyakebako Dispensary and Kionganyo Tea Buying Centre.*
- g. *Failing in carrying out statutory and constitutional mandate.*

It was further stated that as a result of the conduct of the respondents respectively the petitioners were denied or deprived of their constitutional rights to compete in various tender to and or in respect of development projects within the Nyaribari Chache Constituency and that their constitutional and fundamental rights have not only been violated but are also threatened with violation and or infringement and hence the necessity for suitable protection (Emphasis mine).

The particulars of infringement were indicated as:-

- a. *Failing to exhibit transparency and accountability in the tendering of Development projects (Emphasis added).*
- b. *Open and unbundled display of nepotism.*
- c. *Open encouragement of misappropriation of Constituency Development Fund.*
- d. *Diverting and or reallocating monies meant for designated Development Projects without due regard to the rights and interests of the petitioners.*
- e. *Carrying out and or encouraging direct procurement of goods and services (Emphasis added).*
- f. *Abdicating and/or abandoning constitutional responsibilities.*
- g. *Allowing personal whims and or conflicts to override and or supersede public interest and good.*
- h. *Defiling the provision of the constitution.*

The petitioners therefore sought the following prayers:-

- a. Declaration be issued to the effect that the petitioners are entitled to protection under the provisions of the Constitution 2010.
- b. Declaration that the actions, omissions and or conduct of the respondents complained of constituted and or amount to infringement of the petitioners rights to equal treatment before the law and freedom from discrimination in line with the provisions of **Article 20(1) and 27(1) of the Constitution**.
- c. An order compelling the 1st, 2nd and 3rd respondents to disclose, supply and or avail to the petitioner a fair list of the projects duly approved by the 2nd respondent for funding for the year 2013/2014 Nyaribari Chache constituency in line with and in accordance with **Article 35 of the Constitution 2010** and the amounts of monies which have been disbursed.
- d. An order to compel the respondents jointly and or severally to fully disburse the allocated funds to and in respect of duly approved development projects, without favour, discrimination and or patronage.
- e. An order to compel the 1st and 2nd Respondents to tender accounts and or in respect of the disbursements made and the expenditure incurred in respect of the duly approved and sanctioned development projects for the year 2013/2014.
- f. Permanent injunction restraining the 3rd respondent from disbursing and/or further disbursing funds towards and in respect of development projects prior to and before receipt of full compliant accounts pertaining to and in respect of the usage of the disbursed funds.
- g. Costs of the petition.

The petition was certified urgent and fixed for interpartes hearing and in response thereof the respondents took out preliminary objection as follows:-

2nd and 4th Respondents

1) The petition has been instituted in clear disregard of **Section 49 of the Constituencies Development Fund Act No.30 of 2013** the applicable statute.

2) That in due regard to the foregoing the petition is premature and defective as this honourable court is not seized of the jurisdiction to hear and determine the suit.

3) That the entire petition is thus misconceived, incompetent, bad in law, incurable, defective, frivolous and abuse of court process.

2, 3rd RESPONDENT

That this Honourable court lacks jurisdiction to hear and determine this matter as per Section 49 of the Constituency Development Funds Act 2013.

The 4th respondent further filed a replying affidavit in respect to the petition the content of which is not relevant for the purposes of this ruling.

Since the court's jurisdiction was challenged through the preliminary objection herein, I invited the parties to submit thereon as I formed the considered view that the issue of jurisdiction had to be determined before the merits of the petition is gone into.

It was submitted by the respondents that the dispute herein is in relation to the implementation of various projects within Nyaribari Chache constituency and therefore the same should have been governed by the provision of **Section 49 of the Constituencies Development Fund Act No.30 of 2013** and therefore the court's jurisdiction is effectively ousted. In support thereof three High Court decisions of **Peter Ochara Anam & 3 others -vs- Constituencies Development Fund Board & 3 others Kisii Petition No.3 of 2011**, **Geoffrey Kirimi Imathiu & 3 others -vs- Constituency Development Fund Board & others (2013) eKLR** and **Stanley Mungathia Daudi & 4 others -vs- Hon. Cyprian Kubai & others (2013) eKLR** were submitted.

It was further submitted that where the law provides for a procedure the same ought to be followed before the court can assume jurisdiction and in support thereof the following cases were submitted:-

1. **Narok County Council -vs- Transmara County Council & another, Civil Appeal No.25 of 2000.**
2. *Simon Tapai Sannteto Kimunyak Ole Sale versus sila.*
3. **Jared Odoyo Okelo -vs- Fredrick Otieno Outa & others CACA No.46 of 2013 and Diana Kethi Kalonzo -vs- IEBC & others.**

On behalf of the petitioners it was submitted that the Board to whom the dispute under **Section 49** of the **Constituency Development Fund Act** is supposed to be referred to is the 3rd respondent herein and therefore has an interest and on the issue of jurisdiction it was submitted that **Article 165 (3)** of the **Constitution** gives the court jurisdiction as well as **Article 20** as regards violation of rights.

It was submitted that the dispute which can be referred to the Board do not include the disputes pertaining to breach and or violation of Fundamental rights and in support thereof the cases of **United States International University (USIU) -vs- Hon. Attorney General & 2 others Nairobi HCC Petition No.170 of 2012** was submitted.

The following issues are therefore identified for determination:-

- a. *Whether the court has jurisdiction to entertain this petition.*
- b. *Whether the petitioner has followed the right procedure.*
- c. *What order should the court make.*

JURISDICTION

It is clear from the provision of **Section 49** of the **Constituencies Development Fund Act No.30 of 2013** that all disputes of civil nature shall be referred to the CDF Board in the first instance and where necessary an arbitration panel. This provisions of the statute does not oust the jurisdiction of this court which is provided for under **Article 165** of the **Constitution**. What that provision of the Law does is to postpone the exercise of the jurisdiction until some act has been done.

In this regard the court had pronounced itself thus in the case of **Nyeri High Court Petition No.3 of 2014 County Government of Nyeri -vs- The Cabinet Secretary Ministry of Education Science & Technology & another** thus:-

“3. What these provisions of the constitution and statute in respect of the dispute resolution between the national and county government does is not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism have been attempted.”

Though the court has jurisdiction to determine the issue herein, the petitioners should have first followed the set procedure provided for under **Section 40** of the **Constituency Development Fund Act No.30 of 2013** and before coming to court as was stated in the following cases:-

- **Peter Ochara Anam & others -vs- Constituency Development Fund Board and others Kisii Petition No.3 of 2010** where justice Makhandia as he then was had this to say which I totally agree with:-

“The provision is couched in mandatory terms and has no exception or provisons, coming to court by way of a constitution petition is not excepted either much as the constitution is superior law to the statute aforesaid. In view of this provision and there being no allegation or evidence that the petitioner 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 complaint they have raised to the 1st respondent as required by law. It has been stated constantly that where there exist sufficient and adequate legal avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. In

indeed suit a party ought to seek such available statutory provision would be redeemed otiose”

It therefore follows that the petitioner has not followed the right procedure in bringing this petition as the issues raised could be adequately address through the provisions of the Constituency Development Fund Act and Public Procurement and Disposal Act and as I stated in **Nyeri High Court Petition No.8 of 2014 Kelvin Kariuki Kinyune -vs- Dedan Kimathi University of Technology** the petitioner having not exhausted all the other legal avenue available to them, this court is not the correct forum for them to ventilate the issues raised as the court can not micro manage the respondents herein.

In this finding I am in the good company of Makau J in **Meru Petition No.5 of 2013** (supra) where he had this to say:-

“This court is aware of the important tenet of the concept of the rule of law that before exercising its jurisdiction under Article 165 of the Constitution in general it must exercise restraint that it must give chance to relevant constitutional bodies or state agencies an opportunity to deal with complaints and or disputes under the relevant provisions of the parent statute. The court can only act where the petitioners demonstrate that the constitutional bodies or state organs have maliciously or through negligence or otherwise failed to carry out their mandate as provided for in the parent statute and not otherwise.”

The constitutional issues raised by the petitioners will be taken up by the Board as was stated by Majanja J in **Abdi Gulia Adan & others -vs- Chairman Mandera West Constituency Development Fund Committee Petition No.169 of 2012** thus:-

“The process established by the Constituencies Development Fund Act are participatory in nature and those making decision on how to disburse development funds are required to take into account several competing and conflicting interest.

This is why Section 52 of the Act requires arbitration in the first instance in an attempt to resolve any dispute. In resolving such dispute the arbitral tribunal does not keep the constitution in the back pocket. It is required to apply the national values and principle of governance set out in Article 10. The Bill of Rights as required by Article 20 must infuse those decisions thus the petitioner has an assurance that the constitution and the law requires the decision of arbitral tribunal to give effect to the rights and fundamental freedoms of the people he represent (Emphasis added).

It therefore follows that the petition herein is premature and the preliminary objection is allowed. The petition is hereby struck out and dismissed with no order as to cost.

Delivered, dated and signed at Kisii this 28th day of May 2015

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kaburi for Mr. Oguttu for Petitioners

Mr. Soire for Okongo Omogen and Ogure for Respondents