



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 199 OF 2014

JOSEPH GITHINJIPETITIONER

VERSUS

CONSTITUTENCIES DEVELOPMENT

FUND BOARD.....1ST RESPONDENT

HON KIMANI ICHUNGWAH2ND RESPONDENT

RULING

Introduction

1. The petitioner filed the present petition challenging his removal as the Chairman of the Kikuyu Constituency (CDF) Committee by the 1st respondent. In his petition dated 28th April 2014, he seeks the following orders:

A. A declaration that resonating the intention of Article 47(1) of the Constitution and section 24(15) of the Constituencies Development Fund Act 2013 the Chairperson and member of Constituencies Development Fund Committee cannot be removed from office without due process and observing the right to fair administrative action.

B. A declaration that resonating the intention of section 18 and 24(3)(f) of the Constituencies Development Fund Act 2013 that the role of the 2nd respondent as an ex officio member to the Constituency Development Fund Committee is not to control the affairs of the committee but to participate just like any other member of the committee.

C. A declaration that the petitioner remains the Chairperson of the Constituency Development Fund Committee until lawfully removed.

D. An Order of Certiorari to remove from the High Court and quash the letter dated 15th April 2014 whose effect is to suspend the petitioner as the Chairperson of the Kikuyu Constituency Development Fund Committee

indefinitely.

E. A permanent injunction be issued to restraint he 2nd respondent from convening constituency development fund committee meetings since that role is a preserve of the District Procurement Officer who doubles up as the Secretary to the Committee.

F. Costs of his petition be provided.

Background

2. The facts giving rise to the petition which are relevant for purposes of this ruling are set out in the affidavit sworn in support of the petition by the petitioner. The petitioner states that he was the Chairman of the Kikuyu Constituency CDF Committee. He avers that he was suspended by the 1st respondent as the Chairman by way of a letter dated 15th April 2014 pursuant to complaints from the Committee members. He avers further that he was not presented with the details of the alleged complaints against him or afforded an opportunity to respond to the complaints. He therefore alleges that the letter from the 1st respondent violates the provisions of Article 47(1) of the Constitution on fair administrative action.

3. The petitioner further states that he is aware that the 2nd respondent is an ex-officio member of the Kikuyu CDF Committee in accordance with section 24(3)(f) of the Constituency Development Fund Act (CDF Act) 2013, and that his roles are only limited to oversight and not to usurp the executive functions of the committee. He charges the 2nd respondent with persistently meddling in the affairs and the procurement procedures employed by the CDF Committee in exercise of its mandate as stipulated under the Act.

4. According to the petitioner, the 2nd respondent illegally and unilaterally convened a committee meeting on the 24th of December 2013 to specifically and deliberately overrule the minutes and deliberations of a properly constituted and convened committee meeting on the 20th of December 2013. He states that it is the sole responsibility of the District Procurement Officer, who doubles up as the Secretary of the Tender Committee, to convene the CDF Committee meetings, and therefore any meeting otherwise convened, as well as the deliberations thereof, are a nullity. The petitioner further makes various allegations with respect to the conduct of the 2nd respondent, accusing him, inter alia, of micromanagement of the CDF Committee.

5. With respect to the letter from the 1st respondent, the petitioner avers that a Committee member wrote to the 1st respondent on the 24th of March 2014 seeking its intervention on the meddling in the affairs of the Committee by the 2nd respondent. The petitioner avers that this complaint was not responded to by the 1st respondent, nor did it address the issues raised in the said letter regarding the wrangles in the Kikuyu CDF Committee. Instead, it wrote the letter dated 15th of April 2014 asking the petitioner to step aside for investigations.

6. The petitioner alleges that the 1st respondent's actions are in violation of Article 50 of the Constitution on fair hearing and section 24(14) and (15) of the CDF Act which provides the grounds for removal of a committee member, as well as the rules of natural justice on procedural fairness.

7. In response to the petition 2nd respondent filed grounds of preliminary objection dated 10th June 2014 in the following terms:

1. That the petition is incompetent and incurably defective, as the Petitioner has deliberately avoided the mandatory procedure and remedy provided for under section 49 of the Constituency Development Fund Act No

30 of 2013.

2. *That the Honourable Court lacks jurisdiction to entertain the petition, as the petitioner has not demonstrated a clear violation of his Constitutional Rights.*

3. *That, petitioner has no cause of action whatsoever, as he is still the duly gazetted chairman of Kikuyu Constituency Development Fund Committee.*

8. This ruling pertains to the preliminary objections by the 2nd respondent.

The Submissions on the Preliminary Objection

9. In his submissions on behalf of the 2nd respondent, Mr. Wanjohi submitted that the objection to the petition was three-pronged. His first argument was that the petition is incompetent and incurably defective as the petitioner has avoided the mechanism provided under section 49(3) of the CDF Act which requires that disputes of a civil nature arising under the Act be referred to the 1st respondent, the Board, and an arbitration panel appointed. Mr. Wanjohi submitted further that the Kikuyu CDF Committee, through a letter dated 7th April 2015, referred the issue of having suspended the petitioner to the Board and the Board invited the petitioner for a meeting at the constituency on 30th April 2014 but the petitioner failed to attend the meeting. Counsel relied on the cases of **Michael Wachira Nderitu and 3 Others vs Mary Wambui Munene and 2 Others [2012] eKLR and Narok County Council vs Trans Mara County Council [2000] 1EA 161** for the proposition that where a statute establishes a dispute resolution procedure, that procedure must be followed.

10. The second objection to the petition is that the petitioner had not demonstrated a clear violation of his rights as stipulated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**. According to the 2nd respondent, the petitioner alleges violation of his right to be heard but he was given two opportunities to be heard, but declined to attend the meetings of 21st March, 19th March and 7th April 2014.

11. The third objection to the petition is that the petitioner has no cause of action. Mr. Wanjohi submitted that while the petitioner alleges that he was removed as the CDF Chairman of Kikuyu Constituency, he is still the gazetted Chairman, and his removal is only effective upon the gazette of another Chairman by the Cabinet Secretary responsible for matters related to CDF in accordance with section 24(3) of the CDF Act. The 2nd respondent therefore urged the Court to uphold the Preliminary Objection and direct the petitioner to comply with the procedure under the CDF Act.

12. No submissions were made for the 1st respondent as its Counsel left the Court in the course of the proceedings.

13. In his submissions in response, Learned Counsel for the petitioner, Mr. Ateka, submitted that the petitioner did refer his complaint to the CDF Board by his letter dated 24th March 2014. The said letter was written by a Ms. Jane Ngugi. According to Mr. Ateka, the letter from Ms. Jane Ngugi informed the 1st respondent of the disharmony and interference by the 2nd respondent in the affairs of the Committee, but the 1st respondent did not address itself to the complaints raised in the said letter. Instead, the 1st respondent suspended the petitioner on complaints by other committee members and has been reticent to deal with the complaints by the petitioner.

14. The petitioner denied that he had been invited to appear before the Board. It was his case that the dispute resolution mechanism under section 49(3) of the CDF Act was resorted to as it raised the same grounds as are in the petition but was not dealt with by the Board. Mr Ateka submitted that the failure by the 1st respondent to put in motion the mechanism mandated by section 49 of the CDF Act cannot be blamed on the petitioner. It was his submission that it was this failure by the 1st respondent that has led

the petitioner to file this petition. In his view therefore, to allow the preliminary objection will leave the petitioner with no avenue for justice.

15. With regard to the respondent's contention that he had not demonstrated a violation of his rights, the petitioner submitted that he has demonstrated that his rights under Article 47 and 50 have been violated in that he was not given the details of the reasons for his suspension, nor was he given a chance to be heard. It is his case that by ignoring the first letter that was sent to it and acting on the second, the 1st respondent went against Article 47 on fair administrative action. Counsel relied on the decision in **David Oloo Onyango vs Attorney General Civil Application No. 152 of 1986** for the proposition that rules of natural justice should be followed.

16. With respect to the 2nd respondent's contention that the petitioner was still the gazetted Chairman of the CDF Committee and therefore he had no cause of action in this matter, the petitioner submitted that this does not mean that his rights have not been violated, and he should not be denied his rights on a technicality. He therefore urged the Court to consider his plight and dismisses the preliminary objection with costs.

17. In his submissions in response, Mr. Wanjohi argued that the 2nd respondent was an ex officio member of the CDF Committee by virtue of being a Member of Parliament and cannot be said to be interfering with the CDF. He also maintained that the petitioner was given a right to be heard as he was invited to attend a meeting, but that he walked out of the meeting.

Determination

18. While the preliminary objection by the 2nd respondent, as well as his submissions and the submissions made on behalf of the petitioner have extended to cover matters of fact which are not properly the province of consideration under a preliminary objection, at the core of the objection is whether this is the appropriate forum for the determination of the matter before me.

19. It is, I believe, settled law that where there are specialized procedures or a process for resolution of a dispute is provided by law, that process must be followed. This has been the consistent finding of the Court in such decisions as **Peter Ocharo Anam - & Others vs CDF Board – Kisii High Court Petition No 3 of 2010; Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425 and Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No 564 of 2004.**

20. In the present case, it is contended that there is a clear mechanism provided by law under section 49 of the CDF Act, which provides as follows:

1. *all complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the CDF Board in the 1st instance*
2.
3. *Disputes of a civil nature shall be referred to the CDF 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..."*

21. The provisions of this section and their implications were considered in the case of **Geoffrey**

Kirimi Imathiu & 2 Others vs Constituency Development Fund CDF Board & 8 Others, Petition No.4 of 2013 in which the Court expressed itself as follows:

“[19] Whereas in the above case the court was dealing with an application brought pursuant to the provisions of Article 165 of the Constitution, which is not the case in the instant Petition, the circumstances are similar in the sense that in the instant Petition there exists sufficient and adequate mechanisms to deal with disputes in the parent statute namely the CDF Act 2013, which mechanism is provided for in section 49 of the Act. It is clear that where a parent Act makes provisions for resolutions of disputes mechanisms the same ought not to be ignored.

[20] The Petitioners ought to have referred the dispute to the CDF Board as provided for under Section 49 of the Act. The Petitioners were clearly wrong in invoking Constitutional provisions since they have not exhausted the dispute resolution mechanism provided for under the Act.

22. Similarly, in the case of **Stanley Mungathia Daudi & 4 Others vs Cyprian Kubai Kiringo & 3 Others Meru High Court Petition No. 5 of 2013**, the Court expressed the following view with respect to section 49 of the CDF Act:

“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.”

23. Finally, the High Court in **International Centre for Policy and Conflict & 5 Others vs Attorney General & 4 Others (2013) EKLK** stated that:

“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 contrarily 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.....” (Emphasis added)

24. Has the petitioner exhausted the mechanism provided under the CDF Act for resolution of the dispute relating to his Chairmanship of the Kikuyu CDF Committee? The petitioner has relied on a letter to the Chief Executive Officer of the Constituency Development Fund National Board written by a Ms. Jane W. Ngugi and dated 28th April, 2014 to submit that he invoked the dispute resolution procedure under section 49 of the Act, but that the 1st respondent failed to act on his letter.

25. I have considered the letter in question. It is dated 24th March 2014 addressed to the Chief Executive Officer of the 1st respondent, is in the following terms:

Dear Sir,

REF: CDFC KIKUYU

We are seeking your intervention, advice and counsel on recurrent administration issues that could subsequently cause weak and strained working relations in the CDF team if left unattended. This move is informed by the fact that we have regrettably not found a way forward or possible means to ensure the smooth running of the CGFC – Kikuyu operations.

We kindly request you to address the following:

- 1. We need clear separation of roles and duty between the CDFC and the Constituency office.**
- 2. Lack of Constructive and Collective engagement with stakeholders, undue micromanagement, poor external and internal communication with potential of negative impact on team work and collective responsibility.**
- 3. Interference with procurement procedures. We risk unexplainable questioning if we don't continue to safeguard the Laws, Regulations and procedures which govern the CDFC's in addition to professional Conduct, Governance and the acceptable Best Practices.**

We hope that this intervention will assist the CDFC Kikuyu to move forward with minimal challenges that will avoid this kind of regrettable but necessary intervention.

Yours sincerely

JANE W NGUGI

MEMBER

26. Three points stand out with respect to this letter. First, it is written by a member of the Committee, presumably. It is not written by the petitioner. It is written by a third party, albeit a member of the Committee chaired by the petitioner. Secondly, the letter was written on 24th March 2014, some three weeks or so prior to the suspension of the petitioner by the 1st respondent on 15th April 2014. Thirdly, the letter raises concerns relating to the operation of the CDF Committee, and the alleged interference with its functions. Can it be said to be the petitioner referring the dispute regarding his Chairmanship, and his suspension as Chairman, to the 1st respondent? I think not.

27. The present petition has been precipitated by the suspension of the petitioner. It is not about the operation of the CDF Committee for Kikuyu Constituency, although that appears to be what lies at the core of the petitioner's woes with the 2nd respondent. In my view, therefore, there is no evidence that the petitioner invoked the dispute resolution mechanism provided under the CDF Act. Instead, he filed the present petition alleging violation of his constitutional rights.

28. While the Court has very wide jurisdiction under the Constitution, it cannot entertain every claim that is made before it, particularly where there is already a clear mechanism in law for the resolution of the dispute in question. In the circumstances, I find that the first limb of the 1st respondent's objection is merited.

29. That being the case, and bearing in mind that the rest of the objections and submissions go to the merits of the petition and would require an analysis of the facts, it is my view that I need make no further inquiry into this matter.

30. Consequently, the preliminary objection succeeds in part. The petition is therefore struck out, but

with no order as to costs.

Dated Delivered and Signed at Nairobi this 16th day of June 2015

MUMBI NGUGI

JUDGE

Mr. Ateka instructed by the firm of Mr. Manyonge Wanyama & Associates & Co. Advocates for the petitioner

Mrs. Fundi holding brief for Mr. Omwenga instructed by the firm of Jackson Omwenga & Co. Advocates for the 1st respondent

Mr. Wanjohi holding brief for Mr. Ahmednasir Abdullahi instructed by the firm of Ahmednasir, Abdikadir & Co. Advocates for the 2nd respondent