



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**HIGH COURT CIVIL CASE NO. 2 OF 2014**  
**OHULO BUILDING CONSTRUCTION LTD.....PLAINTIFF**  
**VERSUS**  
**CONSTITUENCY DEVELOPMENT FUND BOARD.....DEFENDANT**  
**RULING**

1. This suit has run into headwinds. This court is asked by the Defendant, through a Notice of Motion dated 20<sup>th</sup> September 2014, to strike out the Plaint dated 23<sup>rd</sup> May 2014 and filed on 30<sup>th</sup> May 2014 for lack of Jurisdiction. Is this an objection that the Plaintiff can surmount?

2. In the pleadings under attack, the Plaintiff is claiming the sum of Kshs. 10,395,035/- (ten million three hundred ninety five thousand and thirty five shillings) from Budalangi Constituency Development Fund for work done and services rendered and for value of materials left on the site at Bunyala Stadium. Those Pleadings were amended on 6<sup>th</sup> June 2014 and the original Defendant was substituted for Constituency Development Fund Board. The Board is a Statutory body constituted under The Provisions of The Constituency Development Fund Act(No. 30 of 2013)(hereinafter referred to as **The Act**).

3. In the Notice of Motion under consideration, the Defendant objects to Jurisdiction of this court for two reasons:-

a) **That the suit offends the mandatory provisions of section 49(1) of the Act as an essential step of Arbitration has not been complied with.**

b) **That Section 49(3) of the Act requires dispute of civil nature to be referred to the Board for determination before it is referred to court.**

4. In imploring me to allow the application, Mr. Orieyo for the Defendant, asked me to find that the provisions of sections 49(1) and 49(3) are couched in mandatory terms. It helps to set out the provisions of section 49 of the Act in its entirety:-

**Dispute resolution**

1. **All complaints and disputes by person arising due to administration of this Act shall be forwarded to the Board in the first instance.**

2. **Complaints of a criminal nature shall be forwarded to 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 lawful action taken in his official capacity or for any disputes against the Fund.**

This court is asked to find that the Plaintiff has skipped a mandatory step. Counsel cited two decision in support of the argument, these are :-

**Petition No. 439 of 2014 George Morasa Manyara Vs Hon. Maina Kamanda & 3 others and Nakuru Petition No. 36 of 2014 (1) Wilson Wachira Ngunjiri (2) Beth Wanjiru Njoroge vs Oljororok Constituency Development Fund Committee & 3 others.**

5. In resisting the application, Counsel for the Plaintiff reminded this court that it has unlimited original jurisdiction of civil matters (Article 165 of The Constitution) and that this Constitutional provision shall not be unbowed to Statute. That at any rate the Act upon which the Application is founded has been declared unconstitutional by the High Court.

6. Counsel pointed out that the Dispute before Court was of a contractual and Civil nature. Being alive to the requirements of the law that the matter should in the first instance be resolved by way of Arbitration, the Plaintiff issued a Notice dated 20<sup>th</sup> November 2013. That Notice was said to have been made pursuant to the provisions of Section 52 of the CDF Act. It is unnecessary for the contents of that Notice to be set out here save for this Court to observe that the Notice was issued pursuant to the Provisions of a Statute that had been repealed. The Constituencies Development Fund Act 2003 (Chapter 425 Laws of Kenya) was repealed and replaced by The Constituencies Development Fund Act, 2013 (Act No. 30 of 2013) on 4<sup>th</sup> March 2013.

7. That notwithstanding due service of the notice on 22<sup>nd</sup> November 2014, the Board failed to respond. The Advocate for the Plaintiff then sent out a letter dated 6<sup>th</sup> December 2013 declaring that a dispute had arisen and inviting the Defendant to appoint a panel of Arbitrators to hear and determine the dispute. That letter again did not elicit a response. Subsequently, by a letter of 25<sup>th</sup> March 2014, the Plaintiff issued a seven (7) day notice of intention to sue and true to the notice, eventually mounted these proceedings.

8. It was therefore Counsel's argument that the Plaintiff had complied with the provisions of Section 49 and had in fact referred the matter to the Board in the first instance. Thus it is the Defendant who has failed to appoint Arbitrators and that the Defendant should not be allowed to use the law to deny the Plaintiff access to dispute resolution. That to allow the Defendant to use the provisions of section 49 of The Act would be to jeopardize the claim by the Plaintiff as the claim risks being statute barred under the provisions of the Limitations for Actions Act. This court was called upon to intervene as the Board had failed to consider the dispute.

9. Let me now turn to determine the Application. As a starting point this Court must make a finding as to whether or not the Act upon which the Application is founded is operational. This is because the suggestion by the Plaintiff is that the Constituencies Development Fund Act, 2013 is not in operation as it has been declared unconstitutional by the High Court. No doubt the Plaintiff's counsel must have had

the decision of the High Court in *Institute of Social Accountability & another vs National Assembly & 4 others (2015)* eKLR in mind. The final orders of that court in respect to the operation of the Act is as follows:-

**a. A declaration is hereby issued that the Constituencies Development Funds act, 2013 is unconstitutional and therefore invalid.**

**b) The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.**

**c) The national government may remedy the defect within that period and the Constituencies Development Fund act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.**

(My emphasis)

The invalidity of The Statute was suspended for 12 months from the date of the judgment which was on 20<sup>th</sup> February 2015. That period has not lapsed. Secondly, this Court is not aware that Parliament has repealed The Act. Evidently the Act is still in operation.

10. From the pre-suit conduct of the Plaintiff, it was aware that, the dispute with the Defendant being of a civil nature, ought to have been referred to The Board in the first instance. It is for that reason that it sent out the notice of 20<sup>th</sup> November 2013 albeit under the provisions of the Repealed CDF Act, 2003. The complaint by the Plaintiff is that the Defendant failed in its duty to consider the dispute and it is for that reason that this court should intervene. What, however, is the recourse to a party in circumstances like this?

11. The answer lies in subsection (3) and (4) of section 49. Let me, again, reproduce the provisions of Section 49.-

### **Dispute resolution**

**1. All complaints and disputes by person arising due to administration of this Act shall be forwarded to the Board in the first instance.**

**2. Complaints of a criminal nature shall be forwarded to 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 lawful action taken in his official capacity or for any disputes against the Fund.**

If the Board ignored the invitation of the plaintiff to consider the matter, then the plaintiff is given the option, by the law, to move for the constitution of an Arbitration Panel. Subsection (3) provides that the panel, shall in the first instance, be appointed by consensus of the parties.

12. Faced with the frustration that the Defendant did not respond to the notice of 20<sup>th</sup> November 2013, the

plaintiff sent out a letter of 6<sup>th</sup> December 2013 asking the Defendant to appoint a panel of Arbitrators. That letter ought to be reproduced in full :-

**The Chairman**

**Constituency Development Fund Board**

**P.O. Box 46682-00100**

**KISUMU**

**Dear Sir,**

**RE: A DISPUTE BETWEEN OUR CLIENT UHOLO BUILDING & CONSTRUCTION LIMITED & BUDALANGI CONSTITUENCY DEVELOPMENT FUND**

**“We write to notify you that a dispute has arisen between our client and the above named Budalangi Constituency Development Fund involving non-payment of certain monies due to our client in respect of construction works done and completed as follows;-**

- 1. Bunyala Sports Complex (Siagonjo) unpaid balance is Kshs. 7,901,863/-.**
- 2. 2 staff houses at Maduwa Primary School. the unpaid balance is Kshs. 1,689,405/-**

**The purpose of this letter is to require you to exercise your powers under section 49 of the Constituency Development Fund Act (act No. 30 of 2013) and appoint a panel of arbitrators to hear and determine this dispute in accordance with the Arbitration Act.**

**PLEASE note that if we do not hear from you within 30 days of the date of this letter we will have no other alternative but to take legal action to recover the money owed to our client.**

**Yours faithfully**

**FOR : BRUCE ODENY & CO. ADVOCATES**

**BRUCE O. ODENY**

**C.C. The Chairman, Budalangi CDF**

**P.O. Box 171-50410**

**PORT VICTORIA**

13. As it is apparent, the Plaintiff mis-apprehended the law, somewhat. The empanelment of the Arbitrators is not the prerogative of the Board as suggested by the contents of this letter but one to be reached by consensus of the parties.

The Board appears to have ignored this letter so there was no agreement on the arbitrators. What then was the plaintiff to do?

14. If the plaintiff sensed a reluctance on the part of the Board to appoint or agree to an Arbitration panel then it should have moved the Cabinet Secretary to appoint an arbitrator. This is explicitly provided in sub section 4. The answer did not lie in the Plaintiff commencing these proceedings. That is where the Plaintiff mis-stepped. That suit is premature. And although the Notice of Motion makes reference to the un-amended pleadings, the same fate awaits the amended pleadings of 6<sup>th</sup> June 2014 and filed on 11<sup>th</sup> June 2014 because the entire proceedings are still born.

15. That fate. The entire suit is struck out with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 16<sup>th</sup> DAY OF JUNE 2015.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**ASHIOYA H/B FOR ORIEYO.....FOR THE PLAINTIFF**

**N/A.....FOR THE DEFENDANT**