



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 71 OF 2013**

**CONSOLIDATED WITH**

**NAKURU PETITION NO. 16 OF 2013**

**BETWEEN**

**CONSTITUENCIES DEVELOPMENT FUND BOARD.....  
APPLICANT**

**AND**

**THE INSTITUTE OF SOCIAL ACCOUNTABILITY ..... 1<sup>ST</sup>  
RESPONDENT**

**CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE ..... 2<sup>ND</sup>  
RESPONDENT**

**THE NATIONAL ASSEMBLY..... 3<sup>RD</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup>  
RESPONDENT**

**THE COMMISSION FOR THE IMPLEMENTATION  
OF THE CONSTITUTION ..... 5<sup>TH</sup>  
RESPONDENT**

**RULING**

**Introduction**

1. The application before us is a Notice of Motion dated 6<sup>th</sup> May 2015 seeking the following two principal orders;

a. *That this Honourable Court be pleased to stay the execution of the orders and judgment of the*

*superior court delivered on 24<sup>th</sup> February 2015 at Nairobi pending the hearing and final determination of Civil Appeal No. 97 of 2015 filed by the applicant.*

- b. *That in the alternative, an order by Honourable Court extends the suspension period to declare the CDF Act 2013 invalid from the earlier direction of twelve months to a further period of 4 years.*
2. The application is supported by the affidavit of Yusuf Mbuno, the acting Chief Executive of the Constituency Development Fund Board sworn on 6<sup>th</sup> May 2015 and a further affidavit sworn on 11<sup>th</sup> August 2015. The application is also supported by the 3<sup>rd</sup> respondent through the replying affidavit of Hon. Moses Lesonnet sworn on 6<sup>th</sup> August 2015.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application through a Notice of Preliminary Objection and grounds of opposition dated 8<sup>th</sup> June 2015. The 5<sup>th</sup> respondent also opposed the application based on the grounds of opposition dated 25<sup>th</sup> September 2015.

### **The judgment and decree**

4. Before we deal with the respective arguments of the parties, it is important that we recall the proceedings that have given rise to the application before us. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, as petitioners, filed a petition seeking declarations that **Constituencies Development Fund Act, Act No. 30 of 2013** ('CDF Act') violates the Constitution. After hearing the petition, the court delivered a judgment dated 20<sup>th</sup> February 2015, found the **CDF Act** unconstitutional and as a result made the following orders;
  - 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.*
  - d. *Each party shall bear its own costs.*

### **The Applicant's Case**

5. Mr Mbuno deponed that the applicant has appealed to the Court of Appeal against the judgment of this Court in the instant petition being **Civil Appeal No. 97 of 2015**. He further deponed that the 12 month period suspending the invalidity of the **CDF Act** was not sufficient in view of the government budgetary cycle which runs from 1<sup>st</sup> July to 30<sup>th</sup> June and if the suspension of invalidity is not extended it will affect the projects pending completion. He also stated that some of the projects funded by CDF which take more than 12 months to complete would stall leading to wastage of public funds if an order of stay is not issued or the suspension period extended. He averred that it would be difficult to transition those projects under an arrangement outside CDF within a period of 12 months envisioned by the judgment without affecting ongoing projects negatively.
6. As regards the enactment of new legislation, he contended that the process of enacting a new legislation to remedy the defects in the **CDF Act** is long as it requires input from experts and public participation and given the parliamentary process of passing the legislation into law, the task cannot be accomplished within the 12 month period.
7. Mr Naikuni, learned counsel for the applicant, submitted that an application for stay is for the sole purpose of preserving the status quo pending the outcome of the appeal unlike the stay of execution which is for the sole purpose of preventing the operation of a judgment with the view of giving an appellant the chance of having the appeal heard. He submitted that this Court is not

*functus officio* as it is still seized of the matter in form of supervision to ensure compliance with its orders of 20<sup>th</sup> February 2015 grounded on the Court's inherent jurisdiction to hear and determine the application under **Rule 32(2)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, ("**the Rules**"), **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** and **Articles 159** of the Constitution. Counsel added that under **Rule 32** of **the Rules**, the Court may, for sufficient cause, order for stay of the execution of the orders and judgment delivered on 20<sup>th</sup> February, 2015 as it has unfettered discretion to issue orders of stay of its own judgment and such orders as may be necessary for the ends of justice.

8. On the applicability of the doctrine of *functus officio*, Mr Naikuni submitted that the doctrine does not to bar any engagement by a court with a case that it has already decided but in determining whether the Court is *functus officio*, the court ought to look at the order or relief which is being sought in the case despite the decision. He contended that the law permits a trial court to stay its judgment pending appeal if it is satisfied that substantial loss may result to the applicant unless the orders of stay are made and if the application has been made without unreasonable delay. Counsel submitted that the projects funded by the CDF are in various stages of completion and there would be substantial loss of public funds if the orders sought by the applicant are not granted.
9. Mr Naikuni also submitted that this Court has jurisdiction to hear application for extension of time suspending an order invalidating a Statute. He relied on **Zondi vs MEC, Traditional and Local Government Affairs & Others CCT 73/2003 [2005] ZACC 18** where the South Africa Constitutional Court held that during the period of suspension the Court retained the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its powers to make an order that is just and equitable. Counsel further justified the extension of the suspension of the order of invalidity on the ground that the period granted was not adequate to facilitate extensive public participation and consultation required to remedy any defects in the **CDF Act**. Counsel contended that at the heart of this case is the issue of functions of county government *vis a vis* national government which underlies the debate in constitutionality of the **CDF Act** is complex and bound to create substantial response and debate in amending or re-enacting the **CDF Act**.
10. Mr. Naikuni urged the Court, in considering the present application, to ensure that the purposes and principles of the Constitution are promoted.

### The 3<sup>rd</sup> Respondent's case

11. The 3<sup>rd</sup> respondent supported the applicant's case through the affidavit of Hon. Moses Lessonet, the Chairperson of the National Assembly Committee on CDF. Hon. Lessonet deponed that function of the National Assembly Committee on CDF is to oversee the implementation of CDF and that received reports of the ongoing projects in the whole country and concluded that the CDF cannot be wound up within the period of one year as ordered by this Court as that would occasion loss of public funds. He stated that **Article 201(d)** of the Constitution requires that public money be used in a prudent and responsible way and this Court is therefore bound to ensure that there is no wastage of public funds allocated to CDF and its ongoing projects by allowing the application.
12. Hon. Lessonet further deponed that since this Court delivered its judgment on 20<sup>th</sup> February 2015, the 3<sup>rd</sup> respondent has commenced the process of complying with all orders of the Court, but in its oversight capacity the Committee has received reports that there are ongoing projects that cannot be completed within the stipulated one year time frame.
13. The 3<sup>rd</sup> respondent supported the position taken by the applicant and urged that the Court has inherent original jurisdiction to review its judgment and orders issued pursuant to **Article 165(3)** of the Constitution. Learned counsel for the 3<sup>rd</sup> respondent, Mr Njoroge, supported the position taken by the applicant that the Court has power to extend the period of suspension of the declaration of invalidity and that this court has jurisdiction to make appropriate orders of stay to

meet the ends of justice. Mr Njoroge therefore urged the Court to grant the application as it has brought to the fore the complexity of the matter and the public interest nature of the CDF that was not apparent at the time of writing the judgment.

#### **4<sup>th</sup> Respondent's case**

14. The 4<sup>th</sup> respondent, Office of the Attorney General, did not file any response to the application. Counsel representing the Office, Mr Njoroge, informed that the court that consider the matter and deal with it in accordance with the dictates of the Constitution.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case**

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's opposed the application through the notice of preliminary objection dated 8<sup>th</sup> June, 2015. In their preliminary objection the respondents argued that that this Court does not have jurisdiction as it became *functus officio* upon delivering its judgment. That the Court of Appeal is the appropriate forum to hear any dispute concerning the petition as an appeal has been filed and that there is subsisting stay of execution of the judgment which is still in operation and hence there is nothing new for the High Court to determine.

16. According to the grounds of opposition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that the application was brought in bad faith and is an abuse of the Court process. That it was improper for the High Court to entertain an application for stay of its judgment when the Court of Appeal was already seized of the matter and that the application for stay is unwarranted because there is no imminent threat on the rights of the applicant if the orders are not granted.

17. Mr Waikwa, learned counsel, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that this Court does not have jurisdiction to hear the application as it became *functus officio* upon delivering its judgment and since an appeal has been filed, the Court of Appeal is the most appropriate forum for a stay. Counsel further submitted this Court granted an order of stay as part of its judgment hence an application for stay was unwarranted. Counsel maintained that the Court of Appeal, under its rules, has jurisdiction to hear interlocutory applications pending appeal including application for stay of execution. Mr Waikwa contended that what the applicant is asking the Court to amend its decision and in effect sit on appeal on its own decision. Counsel argued that an appeal having been lodged, the applicant cannot apply to vary the terms of the original judgment as to do so would remove the substratum of the appeal.

18. On the issue for stay of execution, Mr Waikwa submitted that the applicant failed to satisfy the conditions for the grant of an order of stay pending appeal namely; that there is a serious question to be determined, irreparable harm to the public interest will be suffered should the stay not be granted, and the balance of convenience and public interest considerations favour a stay.

19. Counsel further pointed to the fact that the time given by the Court to remedy the defect was sufficient and that allowing the operationalization of the **CDF Act** beyond what was granted by the Court would be against the Constitution and even though the CDF has provided support and is undertaking noble work in the constituencies, it has found to be unconstitutional and any extension would further the illegitimate use of public funds. Counsel also pointed out that the applicant has not demonstrated why it is impossible to wind up the projects within the period given by the Court and any steps it has taken to wind up its operations.

#### **5<sup>th</sup> Respondent**

20. The Commission on Implementation of the Constitution (CIC) filed grounds of opposition dated 25<sup>th</sup> September 2015 in which it stated that the application was *res judicata* and that the Court did not have jurisdiction to review its orders since its jurisdiction was residual and limited to supervision with a view of ensuring compliance with its orders.

21. Mr Nderitu, counsel for the 5<sup>th</sup> respondent, submitted that the issues raised by the applicant are to be determined by the appellate court and that this Court cannot sit on appeal over its own orders and that in the circumstances, the applicant ought to have applied for orders of stay from the Court of Appeal. Counsel further submitted that the application before the court was based on information and material that was available at the time the petition was heard and it had the opportunity to present the same. He therefore concluded that no new information was presented warranting the grant of the orders sought.
22. Mr Nderitu also submitted that the argument in favour of extension based on the ongoing projects was invalid as the Court had taken judicial notice of the government's budgetary cycle in determining a reasonable period for the phasing out of the CDF in the judgment. Further that the Court had directed itself on the fact that there were ongoing projects which required completion and it made the 12 months' suspension period to allow for transition and corrective mechanisms to be taken by the national government. Counsel maintained that the applicant had not demonstrated the steps it had taken towards complying with the judgment of the Court.

### **Analysis and Determination**

23. From the parties pleadings, submissions, oral and written, the application before us raises three issues:
- a. *Whether the High Court has jurisdiction to determine the Notice of Motion dated 6<sup>th</sup> May 2015.*
  - b. *Whether the suspension of the order declaring CDF Act unconstitutional for a period of 12 months may be extended.*
  - c. *Whether the applicant has demonstrated grounds to warrant the grant of a stay of execution or extension of the period of suspending the order declaring the CDF Act invalid.*
24. It is not disputed that the applicant, being dissatisfied with the judgment and decree of this Court, lodged an appeal to the Court of Appeal namely **Civil Appeal No. 97 of 2015** which is now pending for hearing and determination before that court. What we are confronted with is an application that seeks two alternative orders; one for an order of stay and the other for an order of extension of the period of extension of invalidity.
25. There can be no doubt that this court has jurisdiction to grant an order of stay pending appeal hence the objection based on the doctrine of *functus officio* is not well founded. The court's authority to hear and determine the application of stay where there is an undoubted right of appeal has legal and statutory imprimatur found in **Order 42 rule 6(1)** of the **Civil Procedure Rules, Rule 32** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** which mirrors the provisions of the **Civil Procedure Rules** and the inherent jurisdiction of the court (see **Eastern Radio Services vs Tiny Tots [1966] EA 392, Nairobi Metropolitan PSV SACCOS Union Ltd & Others vs County of Nairobi Government and Others Petition No. 486 OF 2013, Nyamodi Ochieng Nyambo vs Telekom Ltd [2015]eKLR**).
26. This Court also has jurisdiction to extend further extend the period of suspension of invalidity where it is just and equitable to do so. This power is a function of the Court's power to grant relief where an application is brought before under **Article 258** of the Constitution by a person claiming that the Constitution has been violated or threatened with violation or breach. In this respect we adopt the statement of principle set out by the Constitutional Court of South Africa in the case of **Zondi v MEC, Traditional and Local Government Affairs and Others (Supra)**.

*[38] The question that arises is whether having considered it just and equitable to suspend the order of invalidity for a fixed period this Court can extend that period. By its very nature an order that is "just and equitable" in the context of the suspension of a declaration of invalidity is subject to variation. This is so because the decision to suspend the declaration of invalidity, the determination of the period of suspension as well as the conditions to be*

*attached to such suspension, are informed by the facts and circumstances that are at the disposal of the Court at the time the order is made. New facts may emerge or circumstances may change and render the period of suspension previously fixed to be unjust or inequitable. In these circumstances, this Court not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case.*

27. The grant of appropriate relief must be governed by the facts and circumstances of each case. In this case when the Court made a declaration of invalidity but suspended the same for a period of 12 months from the date of judgment. The order of suspension was part of the judgment made after careful consideration of the facts before it. The order of suspension was an order in the nature of stay and as a practical matter the Court cannot issue a further stay particularly because the applicant has appealed against the judgment and decree which includes the stay order as part of the relief granted. We therefore hold that the forum for applying for a further order of stay must be in the Court of Appeal.

28. As regards the alternative order of extension, we find that granting the same would vary the tenor and effect of the original judgment that is now the subject of appeal. In other words, the applicant ought to have elected either to appeal the decision or apply for extension of the order of suspension. Having elected to appeal and an appeal having been filed, the applicant cannot seek extension of the order of invalidity as to grant the same would vary the tenor and effect of the judgment appealed from. In the circumstances, the **Zondi's Case** may be distinguished on the basis that in that case there was no further appeal pending or contemplated from the Constitutional Court which is the final court.

29. Since the applicant elected to appeal against the judgment, we find and hold that any further relief from our judgment must now lie in the Court of Appeal. We dismiss the Notice of Motion dated 6<sup>th</sup> May 2015 and order that the costs abide the decision in the appeal.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of December 2015.**

**ISAAC LENAOLA**

**MUMBI NGUGI**

**DAVID MAJANJA**

**JUDGE**

**JUDGE**

**JUDGE**

Mr Naikuni instructed by Naikuni, Ngaah and Miencha & Company Advocates for the applicant.

Mr Wanyoike, Advocate instructed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Mr A. Njoroge, Advocate and Ms Thanji instructed by the 3<sup>rd</sup> respondent.

Mr. M. Njoroge instructed by the Office of the Attorney General.

Mr Nderitu instructed by Nderitu and Partners Advocates for the 5<sup>th</sup> respondent.