



**Institute for Social Accountability & another v Parliament of Kenya & 2 others;
Commission for the Implementation of the Constitution (Interested Party)
(Petition 71 of 2013 & 16 of 2023 (Consolidated)) [2014] KEHC 7356 (KLR)
(Constitutional and Human Rights) (23 January 2014) (Ruling)**

Institute For Social Accountability & Another v Parliament Of Kenya & 3 others [2014] eKLR

Neutral citation: [2014] KEHC 7356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 71 OF 2013 & 16 OF 2023 (CONSOLIDATED)
I LENAOLA, M NGUGI & DAS MAJANJA, JJ
JANUARY 23, 2014**

BETWEEN

**INSTITUTE FOR SOCIAL ACCOUNTABILITY 1ST PETITIONER
CENTRE FOR ENHANCING DEMOCRACY AND GOOD
GOVERNANCE 2ND PETITIONER**

AND

**PARLIAMENT OF KENYA 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
CONSTITUENCY DEVELOPMENT FUND BOARD 3RD RESPONDENT**

AND

**COMMISSION FOR THE IMPLEMENTATION OF THE
CONSTITUTION INTERESTED PARTY**

RULING

Introduction

1. Before us is a Notice of Motion dated 29th August 2013 in which the petitioners seek leave of this Court to amend their consolidated petitions. The application is supported by the affidavits of Wanjiru Gikonyo sworn on 29th August 2013 and 16th October 2013.



2. The petitioners apply for leave to amend their petitions on the ground that while the matter was pending, Parliament amended the Constituency Development Fund Act, 2013 (“CDF Act”).

The Petitioners’ Case

3. In order to fully appreciate the petitioners’ application, it is imperative to highlight the gist of the matter before us.
4. The petitioners challenge the constitutionality of the CDF Act and the process leading to its enactment. They claim that sections of the Act are unconstitutional on various grounds amongst them that it assigns exclusive county government functions to the national government which is a violation of the principle of separation of powers. They also challenge the Act on the basis that its design is such that it locates CDF projects outside the country’s planning processes which will likely lead to the waste of public resources through duplication and conflict with the Constitution and the County Government Act. They also allege that the National Assembly failed to facilitate any meaningful public participation contrary to Articles 10 and 118 of the Constitution.
5. At the crux of the petitioner’s case is an amendment to section 4 of the CDF Act. The CDF (Amendment) Act, 2013 (“the CDF Amendment Act”) amend the principal Act by deleting subsection (2) of section 4 of the Act. It is the amendment to this section that triggered the application before us. Section 4 of the CDF Act provided as follows:

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- (1) There is established a fund to be known as the Constituencies Development Fund which shall-
 - a) Be a national fund consisting of moneys of an amount of not less than 2.5 % (two and half per centum) of all the national government ordinary revenue collected in every financial year;
 - b) Comprise of any moneys accruing to or received by the Board from any other source;
 - c) Disbursed by the national government through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act;
 - d) Be administered by the Board;
 - (2) All moneys allocated under this Act is additional Revenue to the county governments under Article 202(2) of the Constitution to be administered according to section 5.
 - (3) The Fund established under this section shall be the successor to the Constituencies Development Fund established by section 4 of the Constituencies Development and Act, 2003. (Emphasis ours)
6. The petitioners contend that section 4 of the Act is unconstitutional for various reasons. That section 4(1)(a) of the CDF Act seeks to establish a new criteria for equitable sharing different from that provided under Articles 201, 202 and 203 of the Constitution. Under Article 203(2), the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government. According to the petitioners, the Article contemplates that the county governments get 15% or more of the national revenue with the national government getting 75% or less of the national revenue. Therefore, by the enactment of



section 4(1)(a), the National Assembly introduces a new formula where an amount equal to or greater than 2.5% of the national revenue is assigned to the CDF, leaving the national government and county governments to share the amount equal to or less than 97.5% of the national revenue.

7. The Act was also impugned on the ground that it creates a fund to be administered by Members of the National Assembly rather than through the machinery of either the national government or the county governments. In effect, it creates a third entity to share in the equitable allocation of the national resources. The petitioners therefore contend that section 4(1)(a) is invalid in so far as it seeks to alter the constitutionally provided formula for equitable sharing of national revenue.
8. The petitioners also assert unconstitutionality of sections 4(1)(c)-(d) and 4(2) on the basis that their provisions characterize the moneys allocated under the CDF Act as conditional grants to counties yet they are not remitted to the counties but are instead administered by the national government. It is the petitioners' case that the Constitution requires moneys given as a conditional grant be remitted to the counties with conditions regarding what it may be used for or how it should be administered. They aver that even if CDF were to be characterized as a conditional grant, the moneys are not remitted to the Counties. Instead the National Assembly has set up its own structures like the CDF Board and Committees which have no representation from the County, to receive the money and implement projects. The petitioners contend that as a result CDF is not a grant within the meaning of Article 202(2). The petitioner's case is that the ultimate effect of section 4 of the CDF Act is to allow the national government to overstep its restricted constitutional functional mandate by purporting to establish CDF as a conditional grant to the counties.
9. On 6th August 2013, the National Assembly passed CDF Amendment Act. Section 2 of the CDF Amendment Act deletes subsection (2) of the section 4 of the CDF Act. The petitioners contend that information regarding the publication of the Amendment Bill was introduced and passed by the National Assembly in a manner that negated any possibility of public participation contrary to the Constitution. To illustrate this point, Mr Waikwa, learned counsel for the petitioners, submitted that the Bill leading to the CDF Amendment Act dated 2nd August 2013 was passed by the National Assembly on 6th August 2013 and published on 8th August 2013.
10. The petitioners also aver that the proposed amendment was one that concerned the county government and it was therefore necessary to forward it to the Senate for debate and passage in accordance with the Constitution.
11. The petitioners' submit that it is necessary to amend the petition so that the issues relating to the passage of the Bill can be considered by this Court. The petitioners seek to amend the petition in order to raise questions regarding this CDF Amendment Act.
12. The interested party supported the application for amendment while the Attorney General chose to leave the issue to the court for determination.

The Responses

13. The application was substantively opposed by the 1st respondent through its grounds of opposition filed on 4th December 2013.
14. Parliament of Kenya opposes the proposed amendments on the following grounds. First, it contends that the proposed amendment seeks to introduce a new cause of action that is incompatible with the matters currently in issue in the current petition. Second, it states that the proposed amendment shall occasion an injustice to the respondent as it shall be required to defend two incompatible causes of action in one petition. Third, it contends that the application seeks to introduce as parties to the



petition, the National Assembly of Kenya and the Senate yet the 1st petitioner is the Parliament of Kenya which comprises of the National Assembly and the Senate.

15. The 1st respondent attacks the basis for the application set out in the supporting affidavits of Wanjiru Gikonyo sworn on 29th August 2013 and 16th October 2013. It is contended that the depositions are grounded on hearsay; they are argumentative and oppressive and set out excerpts from documents that cannot be verified. The respondent contends therefore that there is no material basis upon which the amendment can be allowed.

Determination

16. Whether or not to grant leave to a party to amend pleadings is subject to the court's discretion. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013 ("the Rules") provides that, "A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court."
17. The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991*, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.
18. The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.
19. Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.
20. Parliament contends that the amendment that the petitioners seek to introduce amounts to a new cause of action. We hold a different view. We note that the petition challenges section 4(2) of the CDF Act which has been amended by the CDF Amendment Act. Both the process of enactment of the CDF Act and the CDF Amendment Act are impugned by the petitioners. In the proposed amendment to the petition, they wish to challenge the process leading to the passing of the CDF Amendment Act. At the end of the day, the substance of the petitioners' claim is a determination of the validity and constitutionality of the CDF Act and on the strength of section 13 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya), a reference to an Act at a given time necessarily connotes reference to the Act as amended.
21. We are of the view that the ends of justice will be achieved and the principles and values enunciated in the Constitution better served if the issues surrounding the CDF Act including the amendments are addressed wholly and exhaustively at one sitting rather than piecemeal. We are alive to the fact that the CDF Act was amended during the pendency of these proceedings necessitating amendment of the pleadings. Without the amendment of the pleadings, the court would be dealing with an academic



issue. As a matter of fact, the general course of proceedings of Parliament and changes in legislation is one of the facts the court is entitled to take judicial notice of under section 60(1) of the Evidence Act (Chapter 80 Laws of Kenya). It is also worth noting that the Court at this point is not concerned with the substantive merits of the petitioners' case as those are matters that the parties will canvass at the hearing.

22. We are satisfied that the proposed amendment will advance the cause of justice rather than stifle it by assisting this court conclusively determine the issues before it. Declining the proposed amendment will only lead to the filing of another suit. We do not wish to encourage the filing of a multiplicity of suits to deal with the issue that is squarely before us. Such an approach would negate the principles of judicial authority enunciated under Article 159(2) which includes expeditious delivery of justice.
23. The other issue raised by Parliament in opposition to the application is that it seeks to introduce as parties to the petition, the National Assembly and the Senate, yet Parliament, which is a party, comprises both organs. Rule 5(d) of the Rules allows this court, either upon application by a party or on its own motion, to order that the name of a party improperly joined be struck out. It also empowers the Court to order that the name of any person who ought to have been joined or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter be added to the petition.
24. As the issue whether the CDF Amendment Act ought to have been laid before the Senate has been raised by the petitioner, we think that it is prudent that both the Senate and the National Assembly, as State organs, be joined to these proceedings. Both houses of Parliament may have different view of the matter and it is in the interests of justice to hear them. We therefore order that Parliament be struck off from the proceedings and the National Assembly and the Senate be joined separately to these proceedings as respondents.
25. We are satisfied that the proposed amendments are made bona fide and are a result of the alteration of the basis of the petitioners' case due to amendment of legislation. The respondents will have a chance to respond to the amended petition or otherwise amend their responses, if they so desire.

Disposition

26. The upshot of our findings is that the Notice of Motion dated 29th August 2013 succeeds. Costs of the amendment shall abide by the outcome of the petition.
27. In view of the nature of the matter and in order to aid its expeditious disposal, we issue the following orders and further directions:
 - (a) Parliament is hereby struck off from these proceedings.
 - (b) The National Assembly and the Senate are hereby joined to these proceedings therefore the amended petition shall provide that the 1st respondent shall be the National Assembly, the 2nd respondent shall be the Senate, the 3rd respondent shall be the Attorney General while the 4th respondent shall be the Constituency Development Fund Board.
 - (c) The petitioners shall within seven (7) days from the date hereof file and serve the amended petition on all the parties.
 - (d) The respondents and interested party shall thereafter be at liberty to file their responses within seven (7) days of service of the amended petition.
 - (e) The parties shall agree on issues for determination within seven (7) days of service of the last pleading.



(f) Thereafter parties shall be at liberty to file and exchange written submissions thereafter.

(g) Mention on 6th March 2014 to confirm compliance and take out hearing dates.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2014

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I. LENAOLA

JUDGE

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MUMBI NGUGI

JUDGE

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D. S. MAJANJA

JUDGE

Mr Waikwa, Advocate instructed by the petitioners.

Mr Njoroge, Advocate instructed by the 1st respondent.

Ms Munyi instructed by the State Law Office for the 2nd respondent.

Mr Naikuni instructed by Naikuni Ngaah and Miencha and Company Advocates for the 2nd respondent.

Mr Nderitu instructed by Nderitu and Partners Advocates for the interested party.

