IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.36 OF 2014

IN THE MATTER OF ARTICLE10(1), 22(1), 23 & 165 (3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 22(1) & 24(6), (7) & 1O OF THE CONSTITUENCY DEVELOPMENT FUND ACT NO. 30 OF 2013

WILSON WACHIRA NGUNJIRI.....1ST PETITIONER

BETH WANJIRU NJOROGE.....2ND PETITIONER

(on their behalf and on behalf of

27 LISTED & OTHER RESIDENTS OF OL'JORO'OROK CONSTITUENCY)

VERSUS

OL'JORO'OROK CONSTITUENCY DEVELOPMENT FUND COMMITTEE.....1ST RESPONDENT

OL'JORO'OROK CONSTITUENCY DEVELOPMENT

FUND ACCOUNT MANAGER.....2ND RESPONDENT

MEMBER OF PARLIAMENT, OL'JORO'OROK

CONSTITUENCY.....3RD RESPONDENT

WARD ADMINISTRATORS, OL'JORO'OROK

CONSTITUENCY.....4TH RESPONDENT

RULING

The notice of preliminary objection dated 27th May, 2014 seeks to strike out the petitioners' notice of motion dated 19th May, 2014 on the grounds that the application is incompetent, bad in law and fatally defective and that the Constituency Development Fund Committee cannot be sued in its own name. The application is brought under Rule 51 Rule 14(1)(a) of the Civil Procedure Rules.

Based on the provisions of Sections 22(1), 24(6 and (7) of the Constituency Development Fund Act (CDF

Act, 2013) and the decision in **Republic v. Hon. Abdirahman Ali Hassan & 14 others; Nairobi H.C. Misc. Application No.113 of 2008; (2008)eKLR** Counsel for the respondents, Mr. Kimani, submitted that the petition is improperly before the court. Terming the dispute herein an administrative issue, Mr. Kimani submitted that Section 49 of the CDF Act, 2013 provides a mechanism for addressing such disputes.

While admitting that this court's jurisdiction is unlimited, Mr. Kimani reiterated that this court is not the proper forum to determine the issues raised in the application hereto. Further, that the Board created under the CDF Act is the one with jurisdiction to hear and determine the dispute, as "the court" of first instance. Pointing out that there is no evidence that the Board was given an opportunity to adjudicate the dispute, Mr. Kimani cited the decision in **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others, Nairobi petition 552 of 2012 (2013)eKLR** for the proposition that where there is a laid down mechanism for dispute resolution, that mechanism (process) should be followed. That decision was quoted with approval in **Njoroge Baiya & 14 others v. National Alliance & Another, Nairobi H.C Petition No.182 of 2013 (2013)eKLR.**

Contending that the order which this court granted to preserve the CDF funds has affected the development of the constituency, Mr. Kimani urged the court to discharge the orders.

In reply, Mr. Chege, counsel for the Petitioners submitted that the preliminary objection does not meet the threshold set in **Mukhisa Biscuit Co. v West End Distributors (1969)EA 696**. He explained that the petition was occasioned by the respondents' non-compliance with the CDF Act; that the petitioners moved the court under **Article 23** of the **Constitution of Kenya 2010**; and that under **Article 165(3)** of the **Constitution,** this court has unlimited jurisdiction to issue the orders sought.

Concerning **Section 49 of the CDF Act** which establishes a dispute resolution mechanism, Mr. Chege submitted that the Section does not override the Constitution in redressing rights. He submitted that the Section was enacted with the presumption that the obligations set therein will be observed. He argued that in the instant case, the respondents are in breach of those obligations. Referring to **Benson Riitho Mureithi v. J.W. Wakhungu & 2 others, Nairobi H.C. Petition No. 19 of 2014 (2014) eKLR** he submitted that where a person obligated by law to follow a certain procedure abdicates it, the court is obligated to step in.

Concerning the contention that the Board created under Section 49 of the CDF Act, should be given an opportunity to adjudicate the dispute, Mr. Chege submitted that the duty to interpret the Constitution is vested in the High Court and cannot be well tackled through arbitration. In this regard, he reffered to **Robert N. Gakuru & Others v. Governor Kiambu County & 3 others Nairobi H.C Petition No. 532 of 2013 (2014) eKLR** for the proposition that the power to decide whether a legislation is unconstitutional is vested in the High Court by **Article 165(3)(d) of the Constitution**. In this regard, Mr. Chege submitted that the CDF Act does not grant an effective remedy to the petitioners.

Reiterating that the requirement of public participation is a right enshrined in the Constitution, he submitted that where a right is enshrined in the Constitution that right takes precedence.

As concerns the requirement for reference of disputes to arbitration, under Section 49 of the CDF Act**,** he submitted that it is trite law that where a party claims that there was an arbitration clause, then the party ought not to file proceedings but bring an application for stay and reference of the matter to arbitration.

Pointing out that the respondents have not brought such an application, Mr. Chege submitted that the preliminary objection is lacking in merit and urged the court to dismiss it with costs to the petitioners.

I have read and considered the rival arguments herein. The sole issue for determination is whether this court is the proper forum to hear and determine the dispute herein as a court of first instance. No doubt this court has unlimited jurisdiction under Article 165(2) of the Constitution. The said jurisdiction cannot, however, be invoked where parliament has specifically prescribed procedure for resolution of disputes. In **Speaker of National Assembly v Njenga Karume** (2008)1 KLR 425, the court held:-

> **"in our view there is considerable merit… that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should strictly be followed."**

I also take note of the decision in **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others** *(supra)* where it was held:-

> **"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 bodies or state organs to deal with the dispute under the relevant provision of the relevant statute...."**

The dispute herein concerns the use of a sum of Kshs.61,961, 923 disbursed to the 1st respondent for the year 2013/2014.

The respondents contend that the application and the petition offends **Section 49 of the CDF Act, 2013** which provides a mechanism for resolution of disputes arising under the Act. The section provides as follows:-

"49. (1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance

> **(2) Complaints of a criminal nature shall be forwarded by 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."**

It is clear from the foregoing provision of law that Parliament did not confer jurisdiction on courts to arbitrate over disputes arising from the administration of the CDF Act as a court of first instance. This being the case, and there being no evidence that the body clothed with jurisdiction to hear and determine the dispute in the first instance was given the opportunity to resolve the dispute, I agree with Mr. Kimani's submission that this court is not the right forum to hear and determine the dispute herein as the court of the first instance. Parliament in creating different dispute resolution mechanisms was alive to the fact that not everything should land in court and not every dispute is a Constitutional issue. If the court were to ignore the other provisions of the other statues as respects jurisdiction, then those provisions would be rendered superfluous and the courts will be overflowing with disputes. This court should only be called upon to intervene if the Board has failed to consider the dispute.

Although counsel for the petitioner is of the view that by filing a response to the application, instead of applying for stay and referral of the dispute to arbitration, the respondents conferred jurisdiction to this court, I take note of the decision of the Court of Appeal, Nyarangi J.A (as he then was) in ***Owners of the Motor Vessel "Lilian S" V. Caltex Oil (K) Limited*** **[1989] KLR 1** that:-

> **"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

Having found that Section 49(1) as read with subsection (3) denies courts jurisdiction to hear disputes concerning administration of the Act, and being satisfied that the dispute herein concerns the Administration of the CDF Act, but not interpretation of the Constitution or CDF Act, I find and hold that this court is not the right forum to hear and determine the dispute herein as the court of the first instance.

The applicant had also argued that the preliminary objection is not a point of law envisaged in the **Mukhisa Biscuit** case. I beg to disagree with the applicant. In the above case, Law JA said:-

> **"so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued, a preliminary point may dispose of the suit."**

The issue here is a pure point of law, as to who has the jurisdiction to deal with the issue before this court fist, the Board under CDF Act or this court.

Before I conclude, one of the points of objection is that the CDF Committee (1st respondent) cannot be sued in its own name. Section 5 of the CDF Act establishes a Board and at Section 5(3)(a), the Board is a body corporate with perpetual succession and a common seal and is capable of suing and being sued. Any disputes under the Act must be directed at the CDF Board. The 1st respondent is non-suited.

The upshot of the foregoing is that the preliminary objection has merit and is sustained. The petition is hereby struck out with each party bearing its own costs.

DATED and SIGNED this 24th day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Gakuhi Chege or the petitioners

Mr. Kimani for the respondents

Kennedy – Court Assistant