



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JR MISC. CIVIL APPLIC. NO.79 OF 2011

AND

**IN THE MASTER OF THE CONSTITUENCIES DEVELOPMENT FUND ACT, ACT NO.10
OF 2003**

AND

THE REPUBLIC APPLICANT

VERSUS

THE CONSTITUENCY DEVELOPMENT FUND RESPONDENT/APPLICANT

EX-PARTE APPLICANTS/RESPONDENTS:

BEN FRANCIS KEBATI

WILFRED SESE INTERESTED PARTIES/RESPONDENTS

RULING

1. The application for determination herein is the Notice of Motion dated 1st October 2013 brought pursuant to **Section 3, 3A** of the **Civil Procedure Act Cap 21, Order 17 Rule 2 (3), Order 53 Rules 1, 2 and 3** of the **Civil Procedure Rules**. The applicant seeks for orders:-
 1. *That this honourable court be pleased to dismiss the Notice of Motion Application dated 12th January 2012 and the entire suit herein.*
 2. *That costs of this application be borne by the Respondents.*
1. The application is premised on the grounds as set out on the face thereof and is supported by the affidavit of Clarah Kimeli sworn on 1st October 2013. The application was duly served upon the Respondents and there is an affidavit of service to that effect sworn by Daniel Roro Ochieng Nyangwara dated 18th June 2014.
2. Briefly Clarah Kimeli the Legal Officer of the Constituency Development Fund Board states that the application by the applicants dated 12th January 2012 has already been overtaken by events owing to the fact that the CDF Committee of North Mugirango/Borabu Constituency as constituted at the time ceased to exist following the conclusion of the Presidential, National Assembly, Senate and County Assembly General Elections held on 4th March 2013.
3. Secondly that the CDF Committee is now being restructured in accordance with the new **Constituencies Development Fund Act of 2013** and the applicants may participate in selection of

new members of the CDF Committee as envisaged under the said Act thereby negating the need to seek the court's intervention in selection of members of the committee.

4. Further that no action has been taken by the Respondents herein to fix the matter for hearing for a period of over one (1) year since it was last fixed for hearing in March 2012.
5. Lastly the deponent of the Supporting Affidavit states that the applicant's application dated 12th January 2012 is fatally defective incompetent and an abuse of the court process and should be struck out because it is not clear from the pleadings what decision they wish to challenge, quash and/or prohibit by seeking the prerogative orders of certiorari and prohibition as the impugned decision is not annexed. No specific particulars to the allegations made are in the bundle “**BFK-1**”.
6. Lastly that the pleadings fail to provide and/or stipulate the actual relief sought by the applicant as is required by the provisions of **Order 53** of the **Civil Procedure Rules**.
7. The application is unopposed. The Respondent has not filed any replying affidavit nor grounds of opposition nor preliminary objection.
8. By the Notice of Motion dated 12th January 2012 the ex parte applicants therein applied for ORDERS:-

1. *THAT an order of certiorari do issue into this Honourable Court to quash the decision of the Respondent vide Member of Parliament North Mugirango/Borabu Constituency, Hon. Wilfred Ombui (herein referred to as the “Patron” who is an agent of the respondent in approving members of CDFC in utter and complete disregard of law and in particular the provisions of the Constituencies Development Fund Act. The action is unilateral, unlawful and a show of impunity.*
2. *THAT an order of Prohibition do issue into this Honourable Court restraining the respondent from mismanaging of the North Mugirango/Borabu Constituency Development Fund by the respondent by itself or its agents in any other way which contravenes or is contrary to the provisions of the **Constituency Development Fund Act (2003)**.*
3. *THAT an order of Prohibition do issue into this Honourable Court restraining the respondent from handling or dealing in any manner whatsoever with the CDF Account of North Mugirango/Borabu Constituency.*
4. *THAT an order of Mandamus do issue into this Honourable Court compelling the respondent to cause the patron to give an account of all the projects funded and how much has been received by those managing the projects and also a physical inspection of all the projects under the Supervision of the Ethics and Anti-Corruption Commission.*
5. *THAT an Order of Mandamus do issue into this Honourable Court Compelling the respondent to cause the patron to set in Motion a process of reconstituting the members of the various committees in accordance with the provisions of the **Constituencies Development Fund Act (2003)** so as to be all inclusive and reflect fair representation of the constituency as a whole and the various interests.*
6. *THAT an Order of Mandamus do issue into this Honourable Court compelling the respondent to cause the patron to convene Constituency Development Fund meetings in each location within the Constituency to consult members on their preferred development projects for funding.*
7. *THAT the cost[s] of this application be provided for.*

1. The Notice of Motion dated 12th January 2012 was premised on 6 grounds set out on its face. The gist of these grounds is that the decision by the Patron to appoint members of the CDF was based on abuse of power; contravened the provisions of the Constituencies Development Fund Act 2003 and that the patron has never convened any meeting at locational level to seek the views of the constituents on what their preferred projects are. The applicants also alleged that the CDF as constituted was not represent the interests of the whole constituency.
2. The verifying affidavit was sworn by Ben Francis Kebati, Secretary of the Constituency Development Fund Committee for North Mugirango/Borabu Constituency since 1st August 2009. The body of the verifying affidavit reiterates the averments set out in the grounds on the face of the Notice of Motion.
3. The Notice of Motion was also supported by a Statutory Statement which sets out the reliefs sought and by who and also sets out the grounds upon which the reliefs sought are based. Leave to commence the Judicial Review proceedings was granted to the applicants on 2nd December

- 2011.
4. Since the filing of the substantive Notice of Motion dated 12th January 2012, the matter has only been listed for mention and on the 21st March 2012, R. Lagat Korir J, gave an order for the mention of the matter on 25th June 2012. On that date, the ex parte applicants did not appear and have never appeared since; hence the instant application for dismissal.
 5. From the conduct of the applicant, since 21st March 2012, it is clear to this court that the applicants and now respondents are not interested in their application dated 12th January 2012. This position is even clearer from the fact that though the ex parte applicants were served with the instant application for dismissal, they filed neither replying affidavit nor grounds of opposition. They did not also answer to the hearing notice for the hearing of the application for dismissal slated for 7th July 2014. In the circumstances, it would be futile maintaining this whole case in the court's registry.
 6. Further, it is clear that the reliefs sought by the exparte applicants vide their application dated 12th January 2012 have been overtaken by events. Following the elections of 4th March 2013, much water has passed under the bridge. The court is not certain that Hon. Wilfred Ombui is still the Member of Parliament for North Mugirango/Borabu Constituency or indeed whether such a constituency still exists following the new boundaries drawn prior to the 4th March 2013 General Elections. In any event, and as rightly stated by counsel for the applicant in the instant application, all Constituency Development Fund Committees have had to undergo restructuring following the 4th March 2013 elections. The persons who were members of the CDF Committee as at 12th January 2012 are not necessarily the same members today and that may explain the sentence with which the exparte applicants have met the instant application for dismissal.
 7. For all the above reasons, I have reached the conclusion that the application for dismissal has merit. Accordingly, the Notice of Motion dated 1st October 2013 be and is hereby allowed in terms of prayer (1) thereof. The costs of the application shall be borne by the exparte applicants.
 8. Orders accordingly.

Delivered, dated and signed at Kisii this 29th day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Nyangosi for Mumaru (present) for Applicant

Miss Chepkirui (present) for Respondents

Mr. Bibu - Court Assistant