



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
PETITION NO 439 OF 2014

GEORGE MORARA MANYARAPETITIONER

VERSUS

HON MAINA KAMANDA1ST RESPONDENT

FUND MANAGER STAREHE CONSTITUENCY2ND RESPONDENT

NATIONAL CONSTITUENCY

DEVELOPMENT FUND BOARD3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

RULING

1. The petitioner filed the present petition challenging the composition of the Starehe Constituency Development Fund (CDF) Committee. It is his contention that the CDF committee as gazetted under Gazette Notice No. 7496 of 4th June 2013 does not meet the constitutional and legal threshold. He seeks various prayers, inter alia, a declaration that the Gazette Notice for Starehe Constituency should be declared null and void; and a declaration that the composition of Starehe CDF committee has not fulfilled the provisions of the Constituency Development Fund (CDF) Act of 2013.
2. The respondents oppose the petition and filed a preliminary objection dated 22nd September 2014 challenging the jurisdiction of the court. They contend that the petition has been instituted in clear disregard of, and offends the provisions of **section 49** of the **CDF Act, 2013**, and the court lacks jurisdictions to entertain it. The parties filed written submissions on the preliminary objection which they asked the court to rely on in making its determination on the preliminary objection.
3. The respondents contend that the petition raises three main issues: the tribal composition of the Starehe CDF Committee; the alleged failure by the 3rd respondent to supply the petitioner with certain information regarding the Starehe CDF, and the alleged misuse and mismanagement of funds by the 1st, 2nd and 3rd respondent.
4. The respondents submit that the CDF Act governs all issues relating to the fund, that the Act sets up a dispute resolution mechanism for the resolution of disputes under the Act, and that the

present petition is an attempt by the petitioner to sidestep the dispute resolution mechanism set up under the Act.

5. The respondents cite the provisions of section 49 of the Act which sets up a Board to hear disputes at first instance and also provides for an arbitral mechanism. They rely on various decisions which are to the effect that where a dispute resolution mechanism has been set up by statute, that mechanism must be followed. It is their submission that mere invocation of constitutional principles, as has been done by the petitioner in this case, does not make a matter fit for resolution by application of the Constitution.
6. They contend further that the complaints about misuse and mismanagement of CDF funds can be resolved through accounting procedures and touch directly on the CDF Act, as does the question of the tribal composition of the Board which should be resolved by the Board.
7. In reply, the petitioner has filed submissions dated 13th October and what is termed as an "Affidavit in Support of the Submissions" sworn on 13th October 2014 in which he makes certain factual averments. As the issue before me relates to the objection on the court's jurisdiction in light of the provisions of the CDF Act, I will consider only the petitioner's submissions in reply to the objection.
8. The petitioner submits that Article 23 gives the High Court jurisdiction to hear and determine applications for denial or violation of a right or fundamental freedom under the Bill of Rights. He submits therefore that the court has jurisdiction to hear this petition for, among other reasons, he has brought the petition under Article 22 and seeks declarations that Gazette Notice No. 7496 dated 4th June 2014 be declared null and void; that the petitioner had corresponded with the respondents with the aim of originating an arbitration process but the respondent replied without suggesting arbitration; and that the 3rd respondent in a letter dated 19th August 2014 advised the petitioner to seek court redress.
9. The petitioner contends further that he could not approach the Board as it cannot annul a Gazette Notice; and that had he known of the composition of the Committee prior to the Gazette Notice, he would have approached the CDF Board.
10. The petitioner also sets out what he terms the unique nature of the petition that makes it different from the judicial decisions cited by the respondents and justifies its being heard by this court: that it calls for the nullification of a Gazette Notice; that the subject matter of the petition is the tribal composition of the CDF Board, which is made up of members of one tribe that Article 232 of the Constitution sets out the values and principles of public service which include the representation of the diverse communities in Kenya, and Article 10 on inclusiveness; and that the effect of the composition of the CDF Committee for Starehe is revealed in the pattern of disbursement of funds by the Committee, which shows that 61% goes to beneficiaries from one community. He therefore asks that the preliminary objection be dismissed with costs.

Determination

11. It is, I believe, not in dispute that the petitioner's grievance arises out of the operations of the Starehe Constituency Development Fund. He is aggrieved by the composition of the Committee, and the manner in which the funds for the Constituency are being used. He has therefore approached this court by way of a constitutional petition, alleging violation of constitutional rights. Objection has been taken by the respondents to the petition on the basis that the issues it raises fall for determination under the provisions of the CDF Act.
12. Section 49 of the Constituency Development Fund Act, No. 30 of 2013, which is relied on by the respondents, provides as follows:

Dispute resolution

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.”*

13. The CDF Board is established under section 6 of the Act, which provides the functions of the Board as being:

6. (1) The functions of the Board shall be-

(a) to ensure timely and efficient disbursement of funds to every constituency;

(b) to ensure efficient management of the Fund;

(c) to receive and discuss annual reports and returns from the constituencies;

(d) ensure the compilation of proper records, returns and reports from the constituencies;

(e) receive and address complaints and disputes

and take any appropriate action;

14. The provisions of the Act are thus clear. Any complaint regarding the administration of the fund is required to be referred to the Board *in the first instance*, and the Board has the mandate to take “*appropriate action*” with regard to the complaint. If the complaint is criminal in nature, the Board is required to refer it to the government agencies charged with prosecution powers, If civil, it may be referred to arbitration. The essence of these provisions, however, is that before a matter arising under the Act is taken to court, it must be subjected to the dispute resolution process under the Act.

15. The question then is whether the respondents are correct in their assertion that this petition is an abuse of the court process for having bypassed the process under the Act. Courts in this jurisdiction have had occasion to consider similar circumstances in which parties have sought to bypass the dispute resolution mechanisms provided by statute and to approach the court by way of constitutional references. In **Speaker of the National Assembly -vs- Karume (2008) 1 KLR (EP) 425**, the Court of Appeal expressed itself as follows:

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

16. In **Francis Gitau Parsimei & Others v National Alliance Party & 4 Others**, the court noted that the Court of Appeal had established the principle that “*where the Constitution and or a*

statute establish a dispute resolution procedure, then that procedure should be followed.”

17. With regard to the CDF Act, this court, in **High Court Petition No. 258 of 2013-James Kariuki Kaguora –vs- Eng. John Kiragu Chege & Others** expressed itself as follows at paragraph 15 of its ruling:

“In this case, there are clear statutory provisions set out in the CDF Act for the resolution of dispute arising from the administration of the Act. Such disputes include the process of formation of CDF Committees and composition thereof provided for under Section 24 of the Act. While the Constitution does provide for protection of fundamental rights and freedoms, it also underpins all other legislation and processes under such legislation. It would be to undermine those processes and hinder the proper and expeditious administration of justice were every issue to be converted to a constitutional issue and filed before the High Court in the first instance.”

18. Similar findings were made by the court in **Phillip Omondi Ogolla –vs-Hon. John Olago Aluoch & Another** in which Muchelule J expressed himself as follows:

“In the same vein, the Constituencies Development Fund Act in its section 49 sets up a dispute resolution mechanism. That mechanism relates to:

“All complaints and disputes by persons arising due to the administration of this Act...”

Such complaints and disputes include the election and/or nomination of members to the Constituency Development Fund Committee. Where any person feels aggrieved by the election or nomination the first point of call is the Board whose duty is to set up an arbitration panel to deal with the matter. The person can only come to court after such resolution. It follows that the plaintiff has an effective alternative mechanism for the resolution of his complaint. He has to exhaust that mechanism before coming to this court.”

19. The decisions of the court in **Kisii High Court Petition No. 3 of 2010-Peter Acharo Anam & 3 Others –vs- Constituency Development Fund Board (2011) eKLR** and **Meru High Court Petition No. 5 of 2013 - Stanley Mungathia Daudi & Others -vs- Hon. Cyprian Kubai Kiringo Member of Parliament Igembe Central Constituency & Others** echo this finding.

20. Like the petitioner in the present case, the petitioners in **Stanley Mungathia Daudi & Others -vs- Hon. Cyprian Kubai Kiringo (supra)** argued that their petition was brought under Article 22 and 23 of the Constitution, an argument that was of no avail in light of the provisions of section 49 of the CDF Act.

21. The reasoning behind giving the CDF Board jurisdiction in the first instance in matters arising out of the implementation of the Fund was alluded to in the decision of Majanja J in **Nairobi High Court Petition No.189 of 2012- Abdi Gulia Adan & Others V Chairman Manderu West Constituency Development Fund Committee** in which the Learned Judge, while dealing with the provisions of the CDF Act, 2007, which was repealed by the 2013 Act, expressed himself as follows::

[7.]“The processes established by the *Constituencies Development Fund Act* are participatory in nature and those who make decisions on how to disburse development funds are required to take into account several competing and conflicting interests. Further, project identification and funding involves several bodies from the local level to the national level. The courts can hardly be expected to superintend over the minutiae of these decisions given the complexity of the issues involved.

[8.]This is why section 52 of the Act requires arbitration in the first instance in an attempt to resolve any disputes. In resolving such disputes the arbitral tribunal does not keep the Constitution in the back pocket. It is required to apply the national values and principles of governance set out in Article 10. The Bill of Rights, as required by Article 20, must infuse those decisions. Thus, the petitioner has an assurance that the Constitution and the law require that decisions of arbitral tribunal to give effect to the rights and fundamental freedoms of the people he represents.”

22.The upshot of my findings above is that the preliminary objection by the respondent succeeds. The petition is therefore struck out with costs to the respondents.

Dated Delivered and Signed at Nairobi this 18th day of December 2014

MUMBI NGUGI

JUDGE

Ms Nyambati instructed by the firm of Ogetto, Ottachi & Company Advocates for the 2nd and 3rd Respondent

Mr Esmail instructed by the firm of Kilukumi & Co. Advocates for the 1st Respondent

Ms Wawira instructed by the State Law Office for the 4th Respondent

Mr George Manyara, Petitioner in Person