



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 21 of 2013

PHILLIP OMONDI OGOLLAPLAINTIFF

VERSUS

HONOURABLE JOHN OLAGO-ALUOCH1ST DEFENDANT

CDF MANAGER – KISUMU WEST2ND DEFENDANT

R U L I N G

The 1st defendant is the member of Parliament for Kisumu West Constituency and the 2nd defendant is a member of the Constituency's Development Fund. This Fund has been created under the Constituency Development Fund Act No.30 of 2013. The plaintiff is a registered voter in this constituency. Under the Act, the 1st defendant was tasked with the organisation of open public meetings of registered voters in each of the five elective wards in the constituency for the purpose of electing nominees for the Constituency Development Fund Committee. On 27/4/13 the 1st Defendant gave notice for the meeting for the election to be held on 30/4/13. It is the contention of the plaintiff that the notice was too short and did not reach the electorate in time and that those who were willing to participate in the process, either as voters or contestants, were thereby denied their constitutional right to participate. For Kisumu South ward the meeting of 30/4/13 was held at Ojolla which was not at the centre of the ward and this led to a good number of voters failing to participate. Further, the plaintiff marshalled his supporters and went to participate but they were sent away by the 1st defendant's supporters who informed them that this was a Ford Kenya party affair, now that the Orange Democratic Movement candidate had lost in the general elections.

It was pleaded that the acts of the defendants of alienating the plaintiff and his supporters was against the spirit, principles and provisions of the Act. His case was that the Committee to be elected was an important organ in the realisation of the objectives of the Fund in infrastructural development, wealth creation and the fight against poverty at the constituency level and therefore the appointment of the members should be above board, transparent and within the law. The elections in question, he pleaded, were marred by irregularities.

The suit sought a declaration that the election held on 30/4/13 was irregular, unlawful and

unprocedural. Fresh election was sought. A further order was sought that the nomination and subsequent appointment of the members of the Committee should take place after the constitution of the office of the sub-county administrator for the constituency and the appointment of the officer of the Board. The suit was filed through AMONDI & Co., advocates whose MR. AMONDI acted for the plaintiff.

The 1st defendant through OLAGO-ALUOCH & Co., advocates and the 2nd defendant through OTIENO, YOGO, OJURO & Co., advocates each objected to the suit, and the motion that was filed along with it on the grounds that the court lacked jurisdiction to hear and determine the matters raised in view of section 49 of the Act and section 52 of the earlier Act. Mr. P. J. Otieno and Mr. R. Otieno prosecuted the preliminary objection as to jurisdiction which Mr. Amondi defended. I have considered the submissions of counsels.

I have no doubt that the issue taken up by the defendants is a jurisdictional one, and therefore a pure point of law. Without jurisdiction the court cannot proceed to hear or determine the suit or application.

(OWNERS OF THE MOTOR VESSEL "LILIAN S" .V. CALTEX OIL (KENYA) LIMITED [1989] KLR 1)

The Constituencies Development Fund Act creates the Constituencies' Development Fund, the Constituencies Development Fund Board, the Chief executive of the Board, the Constituency Development Fund Committee for every Constituency, County Projects Committees and generally provides for the administration and management of funds disbursed to each Constituency. Section 49 deals with "Dispute resolution." Under section 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." Under section 49(3) and (4)

"(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 sub-section (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."

Mr. P. J. Otieno was of the view that if the plaintiff was aggrieved by the manner the notice for the election of nominees to the Committee was done, and also by the conduct of such elections, he was obligated to file the complaint with the Board so that an arbitration panel for the resolution of the dispute could be set up. The dispute would only be referred to court after such resolution. MR. AMONDI's

response was that no Board exists under the Act as the Cabinet Secretary responsible for the Fund has not been appointed. Secondly, counsel argued, the dispute relates to elections and is not therefore one of the disputes contemplated by section 49(1). Counsel informed the court that his client had sent a formal complaint to the Board even though not formally constituted. The other issue he raised was that this court has unlimited original jurisdiction (article 165(3)(a) of the Constitution of Kenya 2010) and should, despite the provisions of section 49 of the Act, have power to hear and determine the dispute.

Article 165(3)(a) of the Constitution of Kenya 2010 is what was section 60 of the former Constitution. In the case of *NAROK COUNTY COUNCIL .V. TRANS MARA COUNTY COUNCIL & ANOTHER*, Civil Appeal No.25 of 2000, the Court of Appeal was dealing with a situation where parliament had by legislation ousted the jurisdiction of the High Court in the dispute between the parties and given it to the Minister as part of his statutory duty. The court held that:

“The extent of the jurisdiction of the High court may not only be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit....The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister.”

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.

It should be borne in mind that under article 159(2)(c) of the Constitution of Kenya 2010, the court has to embrace and promote

“alternative forms of dispute resolution including reconciliation ,mediation, arbitration and traditional dispute resolution mechanisms...”

The Constitution commands that the court is not the only forum for the resolution of disputes (*JIMMY MUTINDA .V. IEBC AND OTHERS HC (Nairobi Law Courts) Misc. Civil Application No.2 & 11 of 2013*).

As to whether there is a Board in existence, I agree with MR. P. J. Otieno that the Act has by its transitional provisions (section 51) provided that the Board under the Constituencies Development Fund Act, 2007 shall continue to be in place until there is a new Board.

In view of the foregoing, I determine that this court has no jurisdiction to hear and determine the dispute contained in the plaintiff's plaint and motion. The plaint and the motion are consequently struck out with costs.

Dated, signed and delivered this 16th day of May 2013

A. O. MUCHELULE

J U D G E