



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 258 OF 2013

JAMES KARIUKI KAGUORA1ST RESPONDENT
PETITIONER

VERSUS

- 1. HON ENG. JOHN KIRAGU CHEGE1ST RESPONDENT**
- 2. LIMURU CDF ACCOUNT MANAGER2ND RESPONDENT**
- 3. LIMURU SUB COUNTY ADMINISTRATOR3RD RESPONDENT**

RULING

1. In the petition dated 16th May 2013, the petitioner seeks the following orders:

- a. *Orders be issued restraining the 3rd Respondent from forwarding the names submitted to him by the 1st Respondent to the chief executive officer of the Constituency Development Fund Board.*
- b. *It be ordered and determined that the members appointed by the 1st and 2nd Respondents were not qualified to serve in the CDF committee for Limuru Constituency.*
- c. *It be ordered, determined and declared that the election spearheaded by the 1st and 2nd Respondents was illegal, null and void and hence their nominees are illegally appointed.*
- d. *The 1st and 2nd Respondents be compelled to appoint another CDF Committee for Limuru Constituency by following the procedure laid down in Section 24 (2) to (4) of the constituencies Development Fund Act, 2013.*
- e. *It be ordered that the Respondents be condemned to pay the costs of this Petition.*
- f. *Such further or other further relief or orders be made as may be just.*

2. The petitioner also filed an application by way of Notice of Motion dated 16th May 2013 in which he sought conservatory orders pending the hearing and determination of the petition.

3. When the matter came up for hearing of the application for conservatory orders, Counsel for the respondents indicated that he intended to raise a preliminary objection with regard to the jurisdiction of the court to entertain the petition. The objection was argued before me on 28th May 2013.

4. The gist of the respondents' objection is that this petition is improperly before this court as the jurisdiction to hear a dispute pertaining to the Constituency Development Fund lies, in the first

instance, on the Constituency Development Fund Board. According to Mr. Odhiambo, Section 49(1) and (3) of the Constituency Development Fund Act, 2013 (CDF Ac) requires that matters arising under the Act should go to the Board at the first instance. He submitted that if one draws an analogy with section 11 and 19 of the Civil Procedure Act, the Board is the lowest court to which this matter should go.

5. Mr. Odhiambo argued that by filing this petition, the petitioners have denied the respondents the protection of section 49 of the Act. He asked the court to be guided by the decision in **Franco vs King (2009) KLR 518** in which it was held that one should follow the rules of procedure provided for the resolution of a dispute. According to the respondents, although the Constitution has given the High Court unlimited jurisdiction, where the law provides a special procedure, that procedure must be followed. No reason had been adduced for the petitioner to file his petition before the court instead of presenting the dispute before the CDF Board, and he asked that the petition be dismissed with costs.
6. In response to the objection on jurisdiction, Ms. Sawe submitted that the matters giving rise to the case before the court are fundamental and have their basis in the Constitution. She submitted that section 24 of the CDF Act sets out the composition of the CDF Committee; that while section 49 provides that the Board has jurisdiction in the first instance, it is ambiguous and tends to contemplate disputes arising from the day to day running of the Board; that Article 159(2) of the Constitution declares any law that is inconsistent with the Constitution null and void; and that therefore the matters presented by this petition are matters that the High Court has jurisdiction to determine as they touch on the fundamental rights and freedoms of the people of Limuru guaranteed under the Constitution.
7. In the petitioner's view, the High Court has jurisdiction under Article 165(3) to deal with matters raising alleged violation of fundamental rights. Ms. Sawe submitted that the petitioner has come under section 258 of the Constitution claiming that a right has been violated, and she therefore urged the court to look at the facts set out in the affidavit and find that it has jurisdiction to hear the petition.
8. In his response to the petitioner's submission that section 49 of the CDF is ambiguous, Mr. Odhiambo contended that there is no ambiguity in section 49; that the petitioner had not moved the court to declare section 49 unconstitutional; and that the petition should be dismissed as it offends the essence of the law.

Determination

9. The petitioner is aggrieved by the manner in which the CDF Committee for Limuru Constituency was constituted. He contends that the respondents erred by inviting applications for the Limuru CDF Committee instead of having them elected by the residents of Limuru at a public meeting, and that they should have issued a notice to the people of Limuru informing them of the convening of a public *baraza* for the election of the members of the CDF Board. He also contends that the interests of various groups in Limuru were not adequately represented in the constitution of the Limuru CDF Committee.
10. Section 6 of the CDF Act, 2013 provides as follows with regard to the functions of the Board:

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;

11. At section 49, the Act provides as follows:

49.(1) All complaints and disputes by person 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.

12. The Act is thus clear that all disputes relating to the administration of the Act shall be dealt with by the CDF Board in the first instance. Section 24 of the Act provides for the composition and appointment of the CDF Committees in constituencies. Such composition, in my view, is part of the administration under the Act contemplated by section 49 of the Act. In my view therefore, it was incumbent on the petitioner to present his complaint with regard to the manner in which the Limuru CDF Committee was appointed to the CDF Board for resolution before filing a matter before this court.

13. I agree with the respondents that there is a clear procedure for resolution of disputes under the CDF Act. Judicial precedents in this jurisdiction are unanimous that where there is a clear procedure provided by the Constitution or legislation, that procedure must be followed. That was the finding in the case of **Franco –vs- Kingi** (supra) relied on by the respondents, and as expressly stated by the Court of Appeal In **Speaker of the National Assembly -vs- Karume (2008) 1 KLR (EP) 425** which Wendoh J relied on in the **Franco –vs- Kingi** case:

“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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

14. A similar position was taken by the Court of Appeal in **Kones vs. Republic and Another ex parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005**.

15. 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.

16. For the above reasons, I find that this petition is improperly before me. Such complaint as the petitioner may have with regard to the composition of the Limuru CDF Committee should be presented to the CDF Board for resolution in accordance with section 49 of the Act.

17. The petition is therefore hereby struck out with no order as to costs.

Dated Delivered and Signed at Nairobi this 7th day of June 2013.

MUMBI NGUGI

JUDGE

Ms. Sawe instructed by the firm of B. J. Saw & Co. Advocates for the Petitioner

Mr. Odhiambo instructed by the firm of Ogola Okello & Co. Advocates for the Respondents