



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
PETITION NO. 5 OF 2013

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 35 AND 38 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONSTITUTION CONSTITUENCIES DEVELOPMENT FUNDS ACT 2013

BETWEEN

STANLEY MUNGATHIA DAUDI.....1ST PETITIONER

JACKSON MUNGATHIA.....2ND PETITIONER

JOSEPH KALUNGE.....3RD PETITIONER

JOSEPH MWITHALII.....4TH PETITIONER

SAMWEL KIBURI.....5TH PETITIONER

AND

HON. CYPRIAN KUBAI KIRINGO MEMBER OF PARLIAMENT IGEMBE CENTRAL CONSTITUENCY.....1ST RESPONDENT

EDWARD KIAKA LIRIA.....2ND RESPONDENT

FLORENCE KANARIO.....3RD RESPONDENT

ESTHER KAUNYANGI.....4TH RESPONDENT

RULING

The petitioners through a petition dated 22nd May, 2013 brought under Article 22, 25 and 38 of the Constitution of Kenya, 2010 sought the following orders:-

1. ***That a declaration do issue to the effect that the petitioners' fundamental rights and freedoms under Article 25 and 28 of the Constitution of Kenya were violated by the 1st-5th respondents.***
2. ***That a declaration do issue to the effect that the exercise purportedly carried out on 8th May, 2013 for the election of Members of the Constituency Development Fund of Igembe Central Constituency from Akirangondu Elective Ward is null and void.***
3. ***An order do issue prohibiting the cabinet Secretary from publicizing the names of persons purportedly elected as members of the Constituency Development Fund of committee Igembe Central Constituency until fair, open and free elections from all elective wards have been held.***
4. ***That a fresh election be ordered for Igembe Central Constituency to fill the vacancies in the CDF Committee in accordance with the law.***
5. ***That costs of the petition be provided for.***
6. ***Such other orders as the court may deem fit and just.***

The respondents filed their Replying Affidavit dated 20th June, 2013 averring that the petitioners' application is misconceived, frivolous and an abuse of the court process and contending that the names of 2nd – 4th respondents were not forwarded as members of the CDF committee of Igembe Central Constituency for appointment through gazette in the Kenya Gazette and attached document of the names forwarded. The respondents further averred that the electoral process was followed and that if any claim of flawed election the same should have been directed to the Officer of the Board in the Constituency who is legally mandated to run and oversee the election process.

On 8th July, 2013 the respondents filed a Notice of Preliminary Objection on points of law against the petitioners' petition dated 22nd May, 2013 setting out the following points of law:-

1. ***That the 2nd – 4th respondents are not parties to the proceedings herein.***
2. ***The correct procedure was not followed by the applicants as ordained by Section 49 of the Constituency Development Fund Act, 2013.***
3. ***This court lacks jurisdiction to entertain this matter therefore.***
4. ***That this is an abuse of the court process and offends the procedure of the Civil Procedure Rule 2(15) (1).***

On 22nd July, 2013 both Counsel agreed to have the preliminary point of law determined by way of written submissions. The petitioners filed their submissions on 2nd August, 2013 whereas the respondents filed their submissions on 8th August, 2013.

The petitioners in their submission to the respondents preliminary point of law submitted that the petition is a Constitution Petition and not any ordinary pleading under Civil Procedure Act and that even if they were to be guided by the Civil Procedure Act, there is no provisions as postulated that is to say Rule 2(15). The petitioners further submitted that the petition is premised under the provisions of Article 22 of the Constitution(Enforcement of Bill of rights) to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been infringed, violated, denied or threatened. The petitioners further contended that under Article 23 of the Constitution of Kenya, the High Court has jurisdiction to hear and determine the applications for reasons of a denial, violations or infringement, threat to a right on fundamental freedom in the bill of rights and listed the reliefs which court can grant.

The petitioners further submitted that the High Court is created under the provisions of Article 165(3) (b) of the Constitution of Kenya and that the High Court has jurisdiction to determine the question as to whether a right or a fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. The petitioners referred to Article 35 and 38 of the Constitution of Kenya and submitted that every person has the right to free, fair and regular elections based on universal suffrage and free expression of the will of the elections for any elective public body/office established. The petitioners concluded by submitting that no elections were held for Akirangondu elective ward and submitted that is the gist of their petition. They submitted a few names were just picked and forwarded for gazette. They submitted that the petitioners were therefore denied their Constitutional Rights as enshrined in Article 38 of the Constitution of Kenya. The petitioner concluded by submitting that their petition is

properly before the court and prayed that the preliminary point of law be dismissed.

The respondents submissions are that this court lacks jurisdiction to entertain the petitioners' petition as the petitioners did not follow the laid down procedure before filing this petition. The respondents in support of their preposition are relying on Section 49 of the Constituency Development Act 2013.

Section 49(1) (3) of the Constituency Development Act 2013 provides:-

“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.

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3. Disputes of all 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.”

The petitioners' petition is premised on the ground that the 1st respondent violated the petitioners' rights by inter alia hand picking and appointing members of the Constituency Development Fund Board; thus denying the petitioners their right of participatory in free, fair and competitive process. The petitioners contends that the elections for the Constituency Development Funds Committee of Igembe Central Constituency was not carried out in accordance with the Constituency Development Fund Act, 2013 resulting in the 2nd to the 4th Respondents being handpicked as members of the constituency Development Committee without going through the election process.

The respondents in their submissions are of the view that the petitioners complaints are of a civil nature that should have in the first instance been forwarded to the Board as expressly set out under Section 49(3) of the Constituency Development Fund Act. The respondents submitted that the petitioners should have followed the laid down procedure instead of clothing their complaint as a contravention of the fundamental right and freedom as protected under the Constitution of Kenya, 2010.

The respondents further submitted as much as they acknowledge the mandate of the High Court as provided for under Article 165 of the Constitution, the Honourable court, should not entertain civil matters or matters which could be addressed through ordinary process as matters of enforcement of fundamental rights.

In support of their proposition the respondents relied on the case of **INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS(2013) Eklr as referred to the case of DIANA KETHI KILONZO & ANOTHER – V- IEBC & 10 OTHERS 2013(2013)** eklr where it was stated:

“[109] 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 constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. “

110. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

In view of the above-mentioned decision the respondents submitted that the Honourable court lacks jurisdiction to entertain the petitioners petition as there is set out mechanism to deal with the issues raised

in the petition.

The respondents further relied on the decision of the case of “**THE OWNERS OF MOTOR VESSEL”LILIANS’ V CALTEX OIL (KENYA) LTD, CIVIL APPEAL NO. 50 OF 1989** in which Nyarangi, J.A as he then was stated:

***“I think it is reasonable plain that a question of jurisdiction ought to be raised as the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*”**

The respondents relying on Order 1 Rule 3 of the Civil Procedure Rules which provides:-

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise” submitted that the 2nd to the 4th respondents are not parties to the proceedings in the petition. The respondents further submitted that the 2nd to the 4th respondents are not elected as members of the Constituency Development Funds Committee; Igembe Central Constituency as exhibited by the respondents’ annexure (KKKI) and as such they are wrongly enjoined. The respondents further submitted that the parties herein and as such the court cannot be asked to issue orders against non-parties. In buttressing their submissions the respondents relied on the case of **ATTORNEY GENERAL V THEURI(1985) KLR 157** in which Court of Appeal stated:-

“We cannot make any order against the Council of Legal Education; it’s Secretary at the relevant time or now or the Principal of the Kenya School of Law because none of them was a party to the application or the reference.”

I have very carefully considered the learned advocates written submissions and authorities relied upon by the advocates and I am greatly indebted to the advocates for their dedicated work and their submissions.

I am however not proceeding on to determine the preliminary point of law without considering recent relevant decisions by the High Court faced with similar preliminary points of law on the issue similar to the one before me in the petition.

In the case of **PETER OCHARA ANAM & OTHERS V CONSTITUENCIES DEVELOPMENT FUND BOARD & OTHERS KISII PETITION NO.3 OF 2010(unreported) (2011)** eklr Hon. Mr. Justice Makhandia, as he then was, stated:-

“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.”

The said sentiments were reiterated by Hon. Justice Musinga as he then was in the case of **HASSAN SHIANO AND OTHERS V NATIONAL COMMITTEE OF THE CONSTITUENCY DEVELOPMENT FUND AND OTHERS NAIROBI PETITION NO. 82 OF 2010**(Unreported) (2011) Eklr.

Further recently in the case of **ABDI GULIA ADAN & OTHERS V CHAIRMAN MANDERA WEST CONSTITUENCY DEVELOPMENT FUND COMMITTEE, NAIROBI PETITION NO.189 OF 2012**(unreported) Hon. Justice D. Majanja stated:-

“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.”

I have noted the petitioners petition is mainly a complaint on the election of the respondents to Igembe Central Constituency Development Committee.

The issue for consideration in the respondents preliminary point of law is whether the 2nd to the 4th respondents are parties to the proceedings herein, whether the correct procedure was followed by the petitioners as ordained by Section 49 of the Constituency Development Fund Act, 2013, whether this court lacks jurisdiction to entertain the petitioners’ petition and lastly whether the petition is an abuse of the court process.

The 2nd to the 4th respondents contention that their names were not forwarded as members of CDF committee of Igembe Central Constituency for appointment through Gazette in Kenya Gazette has not been controverted by the petitioners through an affidavit or challenged in their submissions. The 2nd to the 4th respondents names were not gazetted vide Gazette notice No. 7496 of 4th June, 2013 as members of CDF Committee. The 2nd to the 4th respondents were not properly joined in this petition as the petitioners’ claim discloses no cause of action against the 2nd to the 4th respondents. The petitioners claim against the 2nd to the 4th respondents is based on mere allegation and speculation. I therefore find and note the petitioners claim as against the 2nd to the 4th respondent’s is untenable.

Section 49 of the Constituency Development Fund Act, 2013 sets out the procedure to be followed in respect of all complaints and dispute by persons arising due to the administration of the Act. It is clearly provided that such complaints and disputes shall be forwarded to the Board in the first instance. The Section hereinabove is not a formality but is mandatory. A petition cannot be heard to say he has come to court by way of Constitutional reference with a view to oust a specific provision of a statute. The petitioner is obliged to just exhaust all the remedy as laid down in the respective statute before bringing up a petition to the High Court. A petitioner has no choice but to comply with the specifically spelled out procedure and pursue his remedy accordingly. He cannot be heard to hide behind the Constitutional provisions. The petitioner in this petition did not refer any complaint or dispute to the Board as provided by the Constituency Development Fund Act, 2013. This court is aware of the important tenet of the concept of the rule of law that before exercising its jurisdiction under Article 165 of the Constitution in general, it must exercise restraint that it must give chance to relevant Constitutional bodies or state agencies an opportunity to deal with complaints and/or disputes under the relevant provisions of the

parent statute. The court can only act where the petitioners demonstrate that the Constitutional bodies or State organs have maliciously or through negligence or otherwise failed to carry out their mandate as provided in the parent statute and not otherwise.

It has been stated constantly that where there exists sufficient and adequate mechanism to deal with a specific issue of dispute by other designated Constitutional organs, the jurisdiction of the court should not be invoked until such mechanism has been exhausted.

The Constituency Development Fund Act, 2013 has set out a sufficient and adequate mechanism to deal with complaints and disputes such as the ones raised in this petition and as such I find that the jurisdiction of this court should not be invoked until such mechanism has been exhausted.

In my view this petition is premature and without justification. The court lacks jurisdiction to deal with this petition. This court has no power to make any further step. It has reached a dead end for want of jurisdiction.

I am from the foregoing satisfied that the petitioners have not invoked the dispute settlement procedure provided for under Section 49 of the Constituency Development Fund Act, 2013. The petition is incompetent. The preliminary point of law raised by the respondents succeeds. The petition is struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY AUGUST, 2013

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

- 1. Mr. Mokuu for the petitioners**
- 2. Mr. E. Kimathi for A. Kiautha for the respondents**

c/clerk Kathurima/Penina

J. A. MAKAU

JUDGE