



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO.4 OF 2013

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
AND ENFORCEMENTAL RIGHTS AND FREEDOMS AND ENFORCEMENT
FUNDAMENTAL RIGHTS**

**UNDER ARTICLE (1) & (2) 19,20,3, 38 (2) (a) 47 (1) 258 AND 259 OF THE CONSTITUTION OF
KENYA**

BETWEEN

**GEOFREY KIRIMI IMATHIU.....1ST
PETITIONER**

**CAROLINE KARIMI.....2ND
PETITIONER**

**MERCY NTINYARI.....3RD
PETITIONER**

VERSUS

**CONSTITUENCY DEVELOPMENT FUND CDF BOARD.....1ST
RESPONDENT**

**MEMBER FOR THE NATIONAL ASSEMBLY
BUURI**

**CONSTITUENCY BONIFACE KINOTI GATOBU.....2ND
RESPONDENT**

**DAVID MUTHOMI.....3RD
RESPONDENT**

**MORIS KIRIMI.....4TH
RESPONDENT**

**SABERA GITONGA.....5TH
RESPONDENT**

MR. GITUMA.....6TH
RESPONDENT

CONSTITUENCY DEVELOPMENT COMMITTEE BUURI CONSTITUENCY.....7TH
RESPONDENT

NORTH IMENTI/BUURI/CDF MANAGER.....8TH
RESPONDENT

ATTORNEY GENERAL.....9TH
RESPONDENT

JUDGEMENT

1. By a Constitutional Petition dated 14th May and brought pursuant to the provisions of Article 10 (1) & (2) 19,20,23,38 (8) (a) 47 (1) 258 and 259 of the Constitution of Kenya, the Petitioner's have sought the following reliefs:
 - a. **An order of declaration that the election of 3rd to 6th Respondents is unconstitutional null and void.**
 - b. **The Respondents be prohibited from gazetting the names of the 3-6th Respondents.**
 - c. **An order of injunction to stop the Respondents' affairs until election of 5 representatives for the 8th Respondent are democratically elected.**
 - d. **Any gazettelement which may be issued of the 8th Respondent to be declared null and void.**
 - e. **Costs and interest.**
2. The Petitioner's case is that they are registered voters of Kiirua/Naari Ward and community leaders in the same ward hence competent to lodge the instant Petition. The Petitioner's contend that on 7th May 2013, the 2nd Respondent announced via media that there was to be a public meeting for the purposes of electing members of the Constituency Development Fund Committee for Kiirua/Naari Ward on 11th May 2013 at 9:00 a:m at Kiirua Chief's Camp.
3. The Petitioners aver that on the said date, together with other 3000 members of the ward, they convened to vote for the required 5 officials as stipulated by the Act. They waited until 5 p:m but nobody came to conduct the process. The Petitioners contend that they later received information from the Member of the County Assembly for the area to the effect that elections were held elsewhere and officials elected. The Petitioners further contend that the elections if any, were conducted at a secret venue other than the announced venue and excluding over 3000 registered voters in a Ward with over 10,632 voters was undemocratic, unfair, un participatory and opaque in breach of Article 10 (1) (2) and Article 47 (1) and violated.
4. The 1st to 8th Respondents on the other hand contend that the issues raised by the Petitioners are irrelevant to the 1st and 8th Respondents in that the 1st Respondent does not organize or participate in the election process of the Constituency Development Fund Committee but only oversees the process of the election. The Respondents further contend that all procedures were followed and that notices were sent in time informing the electorate about the venue and time for the elections. The Respondents contend that the elections were free and fair and that officials were elected in accordance with the Constituency Development Fund Act 2013.
5. The 1st, 7th and 8th Respondents have submitted that a notice inviting members of the public to participate in the election of the Buuri Constituency Development Fund Committee members was issued on 3rd May 2013, and that the said notice clearly indicated the respective Ward, venue, date and time when the exercise was to be done and that consequently thereafter, the said elections were duly carried out and a report thereto made compiled by the Fund Account Manager and

confirmed by the Member of National Assembly on 14th May, 2013.

6. The 1st, 7th and 8th Respondents have further submitted inter alia that the contention that the Petitioners are registered voters of Kiirua/Naari Ward as well as being community leaders is insincere as no documentary proof has been adduced and that the fact that the Member of the County Assembly who is alleged to have given the Petitioners the information that elections had been held elsewhere has not been named and/or identified, a state of affairs which renders the source of the information the basis of the Petition to be merely speculative.
7. The issue of jurisdiction was raised by the Respondents'. With regard to the issue of jurisdiction, it has been submitted for the Petitioners, inter alia that the 1st Respondent is the body which should entertain disputes as the provisions of Section 49 of the Constituency Development Fund Act 2013, provide. On this basis, the Petitioners urge the court to determine the matter on merit or alternatively invoke Article 159 (2) of the Constitution and refer the dispute to a neutral body to hear and determine the same. Such as Arbitrators to be agreed upon by the parties. In absence of an agreement the Arbitrator be appointed by the relevant Cabinet Secretary in terms of Section 49 (4) of the Constituency Development Fund Act 2013.
8. The Petitioners in their submissions on jurisdiction admitted that they indeed did not follow the procedure laid down in section 49 of the CDF Act by submitting inter alia and I quote:

”alternatively refer to a neutral body to hear and determine the same such as arbitrators agreed by the parties and in absence of an agreement appointed by the relevant cabinet secretary in terms of section 49 (4) of the CDF Act 2013....”

9. The Respondents have on the other hand countered this submissions stating that this court lacks jurisdiction to hear and determine the matter. They have sought to rely on the provisions of section 49 of the Constituency Development Act 2013, which provides as follows:

1. ***“all complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the CDF Board in the 1st instance***
2.
3. ***Disputes of a civil nature shall be referred to the CDF 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.....”***

10. I have carefully considered the rival pleadings, and arguments and authorities relied upon by the parties. The issues for determination are twofold:

1. Whether this court has jurisdiction to entertain the Petition as brought?
2. Whether this Honorable Court can grant the reliefs sought?

11. In regard to the issue of jurisdiction, Mr. Kariuki for the Petitioners submitted that in the instant matter the 1st Respondent is a party and it is the body which according to the provisions of Section 49 of the CDF Act 2013 should entertain the dispute in the first instance. He further urged that the court in line with Rule 3 of Legal Notice No. 6 of 2006 to uphold justice by determining the matter in a just way and that alternatively court may revert to the alternative dispute resolution mechanism provided by the provisions of Section 49 of the CDF Act 2013. He further submitted that the court should thus entertain and determine the matter on merit.

12. Mr. Ombachi for the 1st, 7th and 8th Respondents submitted that this Honourable Court lacks jurisdiction to hear and determine the Petition as the same emanates from the conduct of the elections of the CDF committee and the procedure and manner of carrying out this elections is governed by section 24 of the Constituency Development Fund Act No. 30 of 2013. He further

sought to rely on Section 49 of the CDF Act.

13. The 4th Respondent contended that all the provisions of the CDF Act No. 30 of 2013 and the Constitutional provisions were followed in the election and that the elections were conducted constitutionally, fairly, democratically, in a participatory and transparent manner ; in a public meeting and not in a secret meeting as alleged by the Petitioners. He further urged the court to dismiss the Petition for want of compliance with Section 49 of the CDF Act.
14. The Respondents relied on the case of **PHILIP OMONDI OGOLLA –V- HON JOHN OLAGO ALUOCH & ANOTHER KISUMU HIGH COURT CIVIL CASE NO.21 OF 2013.** For the proposition that elections of the CDF Committee is an issue arising due to the administration of the CDF Act and should not be a Constitutional matter. In that case, the Learned Judge struck out the case for being incompetent.
15. With regard to the authorities relied upon by the Petitioners, the same are irrelevant. The first authority namely **ALEX MALIKHE WAFUBWA & 7 OTHERS –VS- ELIAS WAMBAKHA A. EAMITA & 40 OTHERS (2012) eKLR** concerned a dispute within Cooperative Society Tribunal whereas the second one namely: **RAPOK CONSTRUCTION-VS- CYKIM LIMITED MERU HCCC NO. 176 OF 2012 (UNREPORTED)** concerned a purely contractual matter between two parties which is not the case in the instant Petition. They are of no relevance or help to the instant case.
16. I have considered persuasive cases. In the case of **PETER OCHARA ANAM & OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND CDF BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eKLR**, Hon Mr. Justice Makhandia, as he then was stated as follows:

“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as 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 petitioners 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 to 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...”

17. In the case of **STANLEY MUNGATHIA DAUDI & 4 OTHERS –V- HON CYPRIAN KUBAI KIRINGO & 3 OTHERS MERU HIGH COURT PETITION NO. 5 OF 2013**, Makau J as he then was had this to say with regard to section 49 of the CDF Act 2013:

“The section herein above is not a formality but is mandatory. A petitioner cannot be heard to say he has come to court by way of a 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.”

18. The High Court faced with a similar situation in the case **INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2013) EKLR** as referred to in the case of **DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) EKLR** it was stated:

“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 contrarily to the institutional independence of IEBC granted by Article 249 of the constitution." Where there exists sufficient and adequate mechanism 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....."

19. Whereas in the above case the court was dealing with an application brought pursuant to the provisions of Article 165 of the Constitution, which is not the case in the instant Petition, the circumstances are similar in the sense that in the instant Petition there exists sufficient and adequate mechanisms to deal with disputes in the parent statute namely the CDF Act 2013, which mechanism is provided for in section 49 of the Act. It is clear that where a parent Act makes provisions for resolutions of disputes mechanisms the same ought not to be ignored.
20. The Petitioners ought to have referred the dispute to the CDF Board as provided for under Section 49 of the Act. The Petitioners were clearly wrong in invoking Constitutional provisions since they have not exhausted the dispute resolution mechanism provided for under the Act.
21. The other issue is whether the court has jurisdiction to refer this case to Arbitration. Mr. Kariuki for the Petitioners urged that in order not to delay the matter, the court should alternatively refer the matter to a neutral body to hear and determine the same such as Arbitrators agreed by the parties and in absence of an agreement appointed by the relevant Cabinet Secretary in terms of Section 49 (4) of the CDF Act 2013. Mr. Ombachi for the respondents has on the other hand contended that once the court has no jurisdiction, it cannot transfer the matter to the right forum.
22. This court does not have the jurisdiction to refer the matter to Arbitration as has been suggested by Learned Counsel for the Petitioners. The provisions of Section 49 of the CDF Act 2013 are mandatory and clear and the Petitioners ought to have referred the dispute in the first instance to the Constituency Development Fund Board.
23. In case the court is wrong on the issue of jurisdiction I will consider whether the Petitioners have a case. Their complaint is that there was a notice of the meeting duly given that the voting for Members of the CDF Committee for Kiirua/Naari would take place on the 11th May 2013 at 9am at Kiirua Chief's Camp. They contend that the voting was conducted at a different venue. That venue was not stated. The Respondents contend that the notices were duly given and sent in time informing the electorate about the venue and the date of the elections and that the same was complied with, and further that the elections were free and fair and the officials elected in accordance to the provisions of the CDF Act.
24. The burden was on the Petitioners to prove their case on a balance of probabilities. The Petitioners have failed to prove their case as they did not annex the offending notice neither did they establish that the voting was held at a different venue.
25. The Petitioners needed to show that they were registered voters. The Petitioners have contended that they are registered voters of Kiirua/Naari Ward and community leaders in the same Ward. They have however not adduced evidence to this effect. Section 24 of the Constituency Development Fund Act which deals with composition of Constituency Development Fund Committee and in particular Section 24 (1) (3) provides as follows:

"(a) within forty-five days of being sworn in, each Member of Parliament for a particular constituency shall convene open public meetings of registered voters in each of the elective wards in the constituency.....;" (emphasis mine).

(b).....

26. The wording of that Section is mandatory and the Petitioners ought to have proved that they were indeed registered voters which they have failed to demonstrate
27. For the above reasons and having come to the above conclusion, I find the instant Petition to be without merit and accordingly dismiss the same with costs to the Respondents.

DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE