



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 264 OF 2010

REPUBLICAPPLICANT

VERSUS

THE CONSTITUENCY DEVELOPMENT BOARDRESPONDENT

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

EX PARTE

THOMAS MONGARE MOINDI, PHILOMEN M. APIEMI, MARY K.

ONDIEKI AND JOHN A. ONYANCHA AS OFFICIALS OF THE MILLENIUM

FORUM FOR UNITY AND DEVELOPMENT

RULING

This ruling is in respect of an application by the **Hon. Dr. James Ondicho Gesami, Evans Onduko, Francis Obare and the West Mugirango Constituency Development Executive Committee** (the applicants) and is dated 19th April, 2011. The applicants sought the following orders:

- “1. That for reasons to be recorded this application be certified urgent and be heard ex parte in the first instance for purposes of prayer 2 hereof;**
- 2. That the honourable court be pleased to grant stay of execution of the orders issued herein by the Hon. Justice Daniel Musinga on 8th April, 2011 pending the hearing of the application inter partes;**
- 3. That the honourable court be pleased to set aside the ruling and orders of court issued herein on 8th April, 2011;**
- 4. That the honourable court be pleased to order enjoinder of Hon. Dr. James Ondicho Gesami, Evans Onduko, Francis Obare and the West Mugirango Constituency Development Executive Committee as interested parties before hearing and determining the application;**
- 5. That the honourable court issues any orders herein in the interests of justice;**

6. That costs of this application be provided for.”

In the ruling that was delivered on 8th April, 2011 this court granted the following orders:

“(a) That an order for prohibition be and is hereby issued restraining the mismanagement of the West Mugirango CDF by the respondent by itself or its agents or otherwise managing the fund in any other way which is contrary to the provisions of CDF Act, (2003).

(b) That an order of mandamus be and is hereby issued compelling the respondent to set in motion a process of reconstituting the West Mugirango Constituency Development Committee in accordance with the provisions of the CDF Act (2003).

(c) That an order of mandamus be and is hereby issued compelling the respondent to cause the patron to set in motion a process of reconstituting membership of various committees in accordance with the provisions of CDF Act (2003) so as to achieve inclusiveness and fair representation of all constituents and interests.

(d) That an order of mandamus be and is hereby issued compelling the respondent to cause a newly constituted West Mugirango Constituency Development Committee to convene constituency development meetings for each location within the constituency to consult constituents on development projects to be funded.

(e) That an order of mandamus be and is hereby issued compelling the respondent to restore funds withdrawn from the West Mugirango CDF account at the instance of the patron Hon. Dr. James Ondicho Gesami for personal use contrary to the provisions of the Constituencies Development Fund Act, 2003.

(f) That the respondents shall bear the costs of this application.”

The applicants’ application was supported by an affidavit sworn by the **Hon. Dr. James Ondicho Gesami**, hereinafter referred to as “**Dr. Gesami**”, who is the Member of Parliament for West Mugirango constituency and the patron of the West Mugirango Constituency Development Fund Committee. The deponent stated that he was not aware that there were allegations that Kshs.1,050,000/= from the West Mugirango Constituency Development Fund had been diverted and banked in his personal account. In the earlier ruling, one **Mr. Kipsang Sambai**, a Forensic Investigator with the Kenya Anti-Corruption Commission (KACC) had stated that their investigations revealed that a sum of Kshs.1,050,000/= had been withdrawn from the Constituency Development Fund and deposited in the bank account of the area Member of Parliament. The court observed that although the area Member of Parliament was aware of that allegation and had sworn an affidavit in support of the respondent’s case he had not denied the aforesaid allegation.

In this application, Dr. Gesami further averred that he was invited by the advocate for the respondent, Messrs Kamau and Company Advocates, to swear an affidavit in support of the respondent’s position and he swore the affidavit as guided by the said advocates and only in response to particular issues that the advocates raised. He had been advised by the said advocates that he was not a respondent in the said matter and as such he did not have the free latitude to depose on all issues to the suit but rather deposed to only those issues that the advocates deemed relevant for the defence of the Constituency Development Fund Board (the respondent).

On 4th May, 2011 Gacheche, J. granted stay of execution of the orders of 8th April, 2011 in so far as the applicant was required to restore the funds that were alleged to have been withdrawn from Mugirango CDF account on condition that Dr. Gesami deposits the sum of Kshs.1,050,000/= in court within fourteen days from 4th May, 2011. The money was so deposited.

Dr. Gesami argued that until the closure of the hearing of the ex parte applicants’ application neither himself nor West Mugirango Constituency Development Fund Committee members were heard on

several serious allegations that were raised in the suit as they had not been made a party to the proceedings. In his view, all the allegations against him and the West Mugirango Constituency Development Fund Committee and which were dealt with in the earlier ruling, were all incorrect and extremely misleading to the general public. Consequently, Dr. Gesami lamented that in hearing and determining the ex parte applicants' application without having joined him as a party and hearing him amounted to breach of the rule of natural justice, *Audi alteram partem*, and the decision was therefore a nullity. Further, there was breach of his legitimate expectation that he would be treated fairly in all decisions that prejudiced him and would be heard before any prejudicial decision was made against him, Dr. Gesami added. He further complained that failure to grant him a hearing amounted to violation of his constitutional right to fair administrative action guaranteed by **Section 47** of the **Constitution of Kenya**.

Lastly, Dr. Gesami argued that unless this court grants the orders sought by the applicants his rights will be prejudiced and his political career both now and in the future will be jeopardized.

Both **Evans Onduko** and **Francis O. Obare** also swore affidavits in support of the averments made by Dr. Gesami. They particularly denied that there had been any mismanagement of the West Mugirango Constituency Development Fund as alleged by the ex parte applicants and the interested party.

Thomas Mongare Moindi, one of the ex parte applicants and the Chairman of Millennium Forum for Unity and Development swore a replying affidavit to the applicants' affidavit. He stated that he had been advised by his advocates on record, which he verily believed to be true, that this court does not have jurisdiction to review administrative actions which extend to quashing, annulling or setting aside its own decisions. He disputed the applicants' contention that they were not heard before the ruling of 8th April, 2011 was delivered. He stated, *inter alia*, that:

- **The ex parte applicants' application was primarily grounded on the fact that the CDF Board had failed to discharge its statutory mandate under the CDF Act in respect of the West Mugirango Constituency Development Fund.**
- **The CDF Board is the only legal personality recognized by the CDF Act.**
- **The applicants are agents of the CDF Board and do not have legal capacity of their own self and are thus non-suited in this matter.**
- **That Dr. Gesami swore a replying affidavit on 14th October, 2010 and thus brought to the fore the West Mugirango Constituency Development Fund Committee's side of the story in the judicial review application. In the affidavit Dr. Gesami unequivocally confirmed that he had the authority of the West Mugirango Constituency Development Fund Committee to respond to the application.**
- **That Dr. Gesami acknowledged that there was cogent evidence of misappropriation of funds from the West Mugirango Constituency Development Fund and that was the reason for suspending some of the committee members.**

For the aforesaid reasons, Mr. Moindi stated that the applicants cannot justifiably claim that the ruling delivered on 8th April, 2011 is contrary to the rules of natural justice on the basis that they were not given an opportunity to be heard before the ruling was drafted and delivered. Further, the applicants cannot argue that their right to fair administrative action was violated. The ex parte applicants urged the court to dismiss with costs the applicants' application.

The interested party filed grounds of opposition to the applicants' application whose contents may be summarized as hereunder:

- **The high court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted. Such an order is final and is subject only to the right of appeal conferred by Section 8 (5) of the Law Reform Act Cap 26.**

- **The inherent jurisdiction of the court cannot be invoked in matters regulated by express provisions of the law.**
- **The West Mugirango Constituency Development Fund Committee or the West Mugirango Constituency Executive Committee is non-suited as it is not a body corporate capable of suing or being sued in its own name.**
- **The Constituency Development Fund Board is the only body that can lawfully be sued under the provisions of the CDF Act, 2003.**
- **Dr. Gesami, having sworn an affidavit for and on behalf of the respondent in opposition to ex parte applicants' application, was granted an opportunity of being heard before the impugned ruling was delivered. Alternatively, all the applicants were aware of the existence of this matter and failed to avail themselves of the benefit of the provisions of Order 53 rule 6 of the Civil Procedure Rules.**
- **A legitimate expectation on the part of the applicants to occupy office until expiry of their tenure cannot arise where the previous members of the West Mugirango Constituency Development Fund Committee were unlawfully removed from office by the patron and replaced by the applicants contrary to the provisions of Section 23 (7) of the CDF Act, 2003 read together with Regulation 12 (2) of the Constituencies Development Fund Regulations, 2004.**

All the parties filed their respective written submissions and highlighted the same. **Mr. Bwire** appeared for the applicants, **Ms Owando** for the respondent, **Mr. Waudu** for the interested party and **Miss Mwau** for the ex parte applicants. I have carefully considered the submissions on record.

The applicants' submissions were on four broad grounds which may be stated as follows:

- (1) **This court did not have jurisdiction to grant prayers (d), (e), (f) and (g) in the Notice of Motion dated 18th August, 2010.**
- (2) **This court has jurisdiction to set aside and/or review the orders made on 8th April, 2011.**
- (3) **There was breach of the rules of natural justice in that the applicants were condemned unheard.**
- (4) **The applicants had a legitimate expectation to be heard before any adverse decisions were made against them.**

All the other parties addressed the same issues raised by the applicants in their submissions and I will therefore determine these issues in the same format as set out by the applicant.

DID THIS COURT HAVE JURISDICTION TO GRANT PRAYERS (d), (e), (f) AND (g) IN THE NOTICE OF MOTION DATED 18TH AUGUST 2010?

The said prayers were:

“(d) Mandamus compelling the respondent to set in motion a process of reconstituting the West Mugirango Constituency Development Committee in accordance with the provisions of the Constituencies Development Fund Act, 2003.

(e) Mandamus compelling the respondent to cause the patron to set in motion a process of reconstituting the membership of the various committees in accordance with the provisions of the Constituencies Development Fund Act, 2003 so as to achieve inclusiveness and fair representation of all constituents and interests.

(f) Mandamus compelling the respondent to cause a newly constituted West Mugirango Constituency Development Committee to convene constituency development meetings in each location within the constituency to consult the constituents on development projects to be funded.

(g) Mandamus compelling the respondent to restore funds withdrawn from the West Mugirango Constituency Development Fund account at the instance of the patron, Hon. Dr. Ondicho Gesami, for personal use contrary to the provisions of the Constituencies Development Fund Act.”

Mr. Bwire cited the provisions of **Halsburys Laws of England**, 4th Edition Vol. 1 at page 130 paragraph 129 which sets out the scope of mandamus in the following terms:

“The order must command no more than what the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is made, a mandamus cannot command the duty in question to be carried out in a specific way.

That principle has been adopted and applied by the Court of Appeal in **KENYA NATIONAL EXAMINATIONS COUNCIL vs. THE REPUBLIC**, Nairobi Civil Appeal No. 266 of 1996 (*unreported*), where the court delivered itself thus:

“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

The functions of the respondent are set out under **Section 6 (1)** of the **Constituencies Development Fund Act, 2003** and are as follows:

- (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) To ensure the compilation of proper records, returns and reports from the constituencies.**
- (e) To receive and address complaints and disputes and take appropriate action.**
- (f) to consider project proposals submitted from various constituencies in accordance with the Act, approve funds for those project proposals that are consistent with this Act and send funds to respective constituency fund account of the approved projects.**
- (g) To perform such other duties as the Minister with the concurrence of the constituencies fund committee may deem necessary from time to time for the proper management of the fund.”**

Mr. Bwire submitted that an order of mandamus could only issue to compel performance of any of the functions stated hereinabove and consequently the court had no jurisdiction to order performance of any other duty.

Further, counsel submitted that **Section 52** of the **Constituencies Development Fund Act, 2003**, provides that all complaints and disputes shall be referred to the Board in the first instance. Subsection (2) thereof requires an arbitration panel to be appointed by the Minister who shall consider and determine the matter before the same is referred to court. In that regard, the jurisdiction to receive and address

complaints is donated to the respondent and the Minister, counsel added. It was thus wrong for the ex parte applicants to come straight to this court. Since the court did not have jurisdiction to grant the aforesaid orders, Mr. Bwire submitted, it was only fair that the same be vacated. He added that a decision made by a court without jurisdiction is a nullity and for that proposition cited several authorities, among them the Court of Appeal decision in **LILLIAN S v CALTEX OIL (K) LIMITED [1989] LLR 1653 CAK**.

The respondent's counsel supported the applicants' submissions in their entirety.

In response, the ex parte applicants' counsel submitted that this court had jurisdiction to issue the orders it did. She stated that all the decisions, actions and/or omissions complained of in the judicial review proceedings by the ex parte applicants against the respondent were made, done or omitted to be done by virtue of the powers granted under the Constituency Development Fund Act and in contravention of the Act.

She stressed that the respondent has a statutory duty to ensure efficient management of the public funds entrusted to it. Since it had been demonstrated that the respondent had not taken any action to remedy the situation after the ex parte applicants requested it under **Section 52** of the **Act** to investigate the various complaints, the court had jurisdiction to issue orders of Mandamus to compel the respondent to perform its statutory duty in respect of the complaints raised.

Mr. Waudu for the interested party concurred with the submissions of Miss Mwau regarding the court's jurisdiction to issue the orders in contention.

In determining whether the court had jurisdiction to grant the orders of Mandamus on 8th April, 2011, I will begin by examining the scope and efficacy of an order of Mandamus as highlighted in **HALSBURY'S LAWS OF ENGLAND**, 4th Edition Volume 1 at Page 111 from paragraph 89 which is as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

In **W.W.R. Wade & C.F. FORSYTH (Ed) (2004) ADMINISTRATIVE LAW**: Oxford University Press 9th Edition at page 615 the learned authors of the text state:

"The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him."

This court was well aware of the functions of the respondent when it granted the orders of mandamus. The respondent has a statutory duty to ensure efficient and transparent management of the public funds entrusted to it for distribution to various constituencies. It is also required to receive annual returns and records from all the constituencies. When members of the public in a given constituency complain about misappropriation of constituency development funds or other acts that may amount to maladministration by a constituency development committee, the respondent has a statutory duty to expeditiously carry out investigations and take appropriate action to address the complaint.

Good governance, integrity, transparency and accountability are some of the national values and

principles of governance spelt out under **Article 10 of the Constitution of Kenya, 2010**, which bind all State Organs, State Officers, Public Officers and all persons whenever any of them applies or interprets any law or public policy decisions.

The ex parte applicants stated under oath that they had brought to the attention of the respondent all the complaints which they eventually brought to court but the respondent did nothing to remedy the situation. The ex parte applicants had a right to fair administrative action that is expeditious, efficient and reasonable in the circumstances of the case, see **Article 47 (1) of the Constitution of Kenya, 2010**. Further, **Article 201 (a)** states that there shall be openness and accountability, including public participation in all aspects of public finance. Public money should be used in a prudent and responsible way and whenever citizens raise a red flag regarding the use of such funds by a public institution or officer, the authority concerned with the management and/or supervision of the funds must expeditiously investigate the complaint and take the most appropriate action in the circumstances.

Since the respondent did not address the complaints raised by the ex parte applicants they had a right to come to court. The court did no more than direct the respondent to perform its statutory duty within the confines of its statutory mandate. The court did not go into the nitty-gritty of how the respondent was to discharge its mandate. For example, since the ex parte applicants satisfied the court that the West Mugirango Constituency Development Fund Committee had not been constituted in accordance with the provisions of the **Constituencies Development Fund Act, 2003**, the court issued an order to compel the respondent to set in motion a process of reconstituting the committee in accordance with the Act. The court did not purport to direct the respondent to appoint some specific people to be members of the Committee.

In interpreting the functions of the respondent as set out under **Section 6 of the Act**, the court must interpret the law in a manner that promotes the purposes and principles of the Act and contributes to good governance. I am well aware that in granting an order of Mandamus **“the order must command no more than the party against whom the application is made is legally bound to perform”**. The court did not interfere with the discretion of the respondent.

I find and hold that the court had jurisdiction to grant the orders of mandamus complained of by the applicant.

That finding leads me to the next issue which is – does this court have jurisdiction to set aside and/or vary the final orders of mandamus which it granted on 8th April, 2011? The applicants’ application to set aside the orders was brought under the inherent powers of the court. The applicants’ counsel submitted that the court has jurisdiction and one of the authorities he cited in support of that submission is this court’s ruling in **REPUBLIC v DIRECTOR OF PENSIONS Ex parte CHARLES WANJOHI MWANGI [2005] eKLR**. However, I think counsel misapprehended the court’s finding. I will highlight the relevant portion of that ruling as hereunder:

“Recently, I had occasion to consider whether the court has jurisdiction to review or set aside its own orders made in judicial review proceedings – that was in COMMISSIONER OF CO-OPERATIVES VS FRANCIS NJUGUNA KUBAI & OTHERS Misc. Civil Application No. 374 of 2003. Section 8(2) (3) and (5) of the Law Reform Act Cap 26 Laws of Kenya provide a good point in considering the above issue and it is important that I restate them.

“8(2) In any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by sub-section (5) of this Section.

(4)

(5) **Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this Section may appeal therefrom to the Court of Appeal.”**

My understanding of the provisions of Section 8(3) is that once the High Court has issued the orders of Mandamus, Prohibition or Certiorari, one cannot ask that court to review or set aside such an order but can appeal against the grant of such an order to the Court of Appeal. The use of the words “any such order” in sub-section (3) of the above quoted section clearly refers to “an order of Mandamus, Prohibition or Certiorari” as in sub-section (2). That, in my view, excludes any other interlocutory order for example an order granting leave to apply for an order of certiorari or an order directing that grant of such leave shall operate as stay of some proceedings.

I would add that in sub-section (3) the words “the order shall be final, subject to the right of appeal” imply that there is no room for exercising any discretion whatsoever by the High Court as to whether to entertain an application for review or setting aside after the final orders aforesaid have been made.”

In respect of interlocutory orders, like grant of leave to commence judicial review proceedings, the court held that it can do so under its inherent jurisdiction.

There are several other decisions to that effect and one of them is **METHANG’ATHIA & 4 OTHERS vs DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MERU NORTH (NYAMBENE) DISTRICT & 3 OTHERS, [2000] KLR 500**. In that matter, Amin and Khamoni, JJ held that the High Court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted. Such an order is final and subject only to the right of appeal conferred by **Section 8(5) of the Law Reform Act Cap 26**.

While I agree that the purpose of the inherent jurisdiction of the court is to enable the judiciary to hold, protect and fulfill its judicial function of administering justice according to the law in a regular, orderly and effective manner as stated in the case of **REPUBLIC v REGISTRAR OF SOCIETIES ex parte JUSTUS NYANGAYA & 3 OTHERS [2005] eKLR**, I must add that judicial review proceedings are special proceedings governed by specific provisions of the law, **Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules**. The court cannot invoke its inherent jurisdiction to set aside a final order of mandamus when **Section 8(3) of the Law Reform Act** specifically provides that a person aggrieved by such an order can only appeal against the same. The case of **MULIRA v DASS & ANOTHER [1971] 2 EA 227** which was cited by the applicants’ advocate as authority for his submission that the court has inherent power to set aside any order improperly made is not relevant in these proceedings because that case was in respect to a trespass to land and not judicial review proceedings as the case herein.

I find and hold that this court does not have jurisdiction to set aside the orders of mandamus as sought by the applicant.

Having come to the conclusion that this court does not have jurisdiction to grant the orders sought by the applicant, it would be superfluous to consider the remaining two issues that were raised by the applicants – whether there was breach of the rules of natural justice and whether the applicants had a legitimate expectation to be heard before any adverse orders were made against them. But in passing I wish to state that one of the applicants, Dr. Gesami, as a member of the West Mugirango Constituency Development Committee, filed an affidavit. The other applicants were well aware of the issues raised by the ex parte applicants. Dr. Gesami responded to such issues as he deemed appropriate. He cannot therefore say that he was not heard at all. Dr. Gesami raised this same issue in **Petition No. 376 of 2011, Hon. James Ondicho Gesami vs. The Hon. Attorney General & 2 Others** and in a well considered ruling, Ngugi, J. dismissed his contention and stated:

“Clearly the petitioner had read the allegations made against him in that application by the applicants, and understood them yet chose not to respond to what was alleged against him. To then turn around and say that he was not heard in that case or that he did not have latitude to respond to matters other than what he was asked to respond to by the respondents’ advocates is to stretch credulity somewhat.”

Although the applicants had not been named as respondents in these proceedings if they wanted to participate in the proceedings in any other way other than through the affidavit sworn by Dr. Gesami they were at liberty to come to court under the provisions of **Order 53 rule 6** of the **Civil Procedure Rules** which states that:

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.”

Dr. Gesami, being the patron of the West Mugirango Constituency Development Fund Committee, stated in paragraphs 2 and 3 of his replying affidavit that:

“2. That I have carefully perused the Notice of Motion dated 18th August 2010, the verifying affidavit and the statement therein and wish to respond as follows.

3. That I have also been shown the earlier affidavit filed by Boniface Makongo the Legal Officer of the Constituency Development Fund Board (hereinafter referred to as “the Board”) and wish to crave the court’s leave to refer to it and rely on it entirely.”

Dr. Gesami cannot therefore say that this court made adverse orders against him without having been given an opportunity to be heard. The same applies to the other members of the Committee.

All in all, I find no merit in this application and dismiss the same with costs to the ex parte applicants and the interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Bwire for the Applicant

Miss Mwau fur the Ex Parte Applicant

Miss Owando for the Respondent

No appearance for the Interested Party