



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 402 OF 2012

BETWEEN

BERNARD SAMUEL KASINGA.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CONSTITUENCIES DEVELOPMENT

FUND BOARD.....2ND RESPONDENT

THE CONSTITUENCY DEVELOPMENT FUND

COMMITTEE/MUTITO CONSTITUENCY..... 3RD RESPONDENT

KIEMA KILONZO4TH RESPONDENT

FRANCIS MUMO KITETU.....5TH RESPONDENT

KYENZA MUTAVANYA MUTIA.....6TH RESPONDENT

SIMON MWATWA NDAMBUKI.....7TH RESPONDENT

TOM MWALIMU KILONZO.....8TH RESPONDENT

RULING

Introduction and background

1. The dispute in this matter concerns the management of the Mutito Constituency Development Fund. The Constituency Development Fund is established under **section 4** of the ***Constituencies Development Fund Act, (Act No. 10 of 2003)*** (hereinafter “the Act”) and is a vehicle for funding development projects at the grassroots level.

2. Under **Section 6** of the Act, the Constituencies Development Fund Board, the 1st respondent, is mandated to;

- (a) Ensure timely and efficient disbursement of funds to every constituency;
- (b) Ensure efficient management of the Constituencies Development Fund;
- (c) Receive and discuss annual reports and returns from the constituencies;
- (d) Ensure the compilation of proper records, returns and reports from the constituencies; and
- (e) Receive and address complaints and disputes and take any appropriate action in respect of the constituencies Development Fund.

3. The Constituency Development Committee is established under **section 23** of the Act and is charged with the responsibility of among others allocation and distribution of money to various projects in the Constituency. The Committee is headed by the Chairperson, who is the local Member of Parliament, assisted by other local representatives.

4. The petitioner's case is set out in the petition and the petitioner's supporting affidavit sworn on 11th September 2012 and it revolves around the allegations of misappropriation of CDF monies by the 4th to 8th respondents. In the petition the petitioner seeks the following reliefs;

(a) An order be and is hereby issued restraining the 4th, 5th, 6th, 7th and 8th respondents from withdrawing the sum of Kshs.50,278,998.50 received on 24th August, 2012 and any other money resting in account number 0720292440776 in the name of Mutito Constituency Development Fund operated with Equity Bank Ltd.

(b) An order be and is hereby issued restraining the 4th, 5th, 6th, 7th and 8th Respondents from making any cheque payments, cash withdrawals and or in any way whatsoever operating account numbers 0720292440776 in the name of Mutito Constituency Development Fund, 0720295705877 in the name of Mutito Constituency Primary School Materials, 0720196562193 in the name of Mutito Environmental Project Committee, 0720196660226 in the name of Mutito Constituency Sports Committee, 0270197865536 in the name of Thua Water Project and any other related accounts all operated with Equity Bank Ltd.

(c) An order be and is hereby issued directing the respondents to render true and correct accounts and receipts of all the sums deposited into and withdrawn from account numbers 0720292440776 in the name of Mutito Constituency Development Fund, 0720295705877 in the name of Mutito Constituency Primary School Materials, 0720196562193 in the name of Mutito Environmental Project Committee, 0720196660226 in the name of Mutito Constituency Sports Committee, 0270197865536 in the name of Thua Water Project and any other related accounts all operated with Equity Bank Ltd from the date of opening the accounts to the date of this order.

(d) A declaration that the 4th, 5th, 6th, 7th and 8th respondents are personally liable to the people of Mutito Constituency for the sum of Kshs.36,920,480,00 lost and or misappropriated pursuant to the said the 4th, 5th, 6th, 7th, 8th respondents actions, omissions, directions and or approval.

(e) An order directing the 4th, 5th, 6th, 7th and 8th respondents to make good the loss of the sum of Kshs.36,920,480.00 by refunding the same to 3rd respondent.

(f) A declaration that the 4th, 5th, 6th, 7th and 8th respondents have contravened the provisions of Chapter six of the Constitution, are unfit to hold any state office and disqualified from holding any state office.

(g) *The costs of this petition be provided for.*

(h) *Any other orders that this honourable Court may deem fit to grant.*

Preliminary Objection

5. When this matter came up for directions on 6th December 2012, I directed the parties to address the court on the preliminary issue identified by the respondents, that is whether this suit should proceed for hearing in light of **section 52** of the *Constituencies Development Fund Act, 2003* which provides as follows;

52. (1) All complaints shall be forwarded to the Board.

(2) Disputes shall be referred to the Board in the first instance and where necessary an arbitration panel shall be appointed by the Minister who shall consider and determine the matter before the same is referred to court.

Submissions

6. Mr Gatonye, counsel for the 3rd to 8th respondents, submitted that the application for conservatory relief and the petition is in the form of a complaint against the respondents respecting the management of Mutito CDF. The respondents contend that based on the material before the court there is no evidence to show that a complaint had been referred to the Board as required by the Act or the dispute resolution process established under the Act exhausted before the filing of the petition. Accordingly, a condition precedent for invoking jurisdiction has not been met by the petitioner. Counsel contended the letters relied upon by the petitioner as complaints were not in substance complaints contemplated under the Act and were not addressed to the Board as required by **section 52** of the Act.

7. Mr Gatonye referred to several decisions where the High Court has dealt with **section 52** of the Act and has held that a suit filed without invoking the dispute resolution procedure is premature. Counsel referred to *Peter Ochara Anam and Others v Constituencies Development Fund and Others Kisii Petition No. 3 of 2010 (Unreported) [2011] eKLR*, *Hassan Shano and Others v National Committee of the Constituency Development Fund and Others Nairobi Petition No. 82 of 2010 (Unreported) [2011] eKLR* and *Francis Gitau Parsiemi and Others v National Alliance Party and Others Nairobi Petitions No. 356 and 359 of 2012 (Unreported) [2012] eKLR*. Mr Kamau, counsel for the 1st respondent and Mr Naikuni, counsel for the 2nd respondent, supported the submission by Mr Gatonye.

8. Mr Havi, counsel for the petitioner, submitted that **section 52** of the Act does not oust the jurisdiction of the High Court and in this case the petitioner has raised the complaints subject of the petition. Counsel contended that the petitioner has alleged that no action had been taken on complaints raised by him and this plea remained uncontroverted by the respondents. Mr Havi submitted that the letters of complaint relied upon set out the substance of the complaint. He asserted that the complaint is supported by the evidence contained in the depositions hence the condition precedent to an action has been satisfied and the pre-condition imposed by the Act has been exhausted.

9. Mr Havi maintained that the High Court has unlimited jurisdiction under **Article 165** to grant orders sought in the application and the petition and those prayers cannot be granted through the mechanisms of **section 52** of the Act. Counsel cited the case of *Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported) [2012] eKLR* for the proposition that the High Court retains unlimited original jurisdiction which extends to supervisory jurisdiction under **Article 165** to ensure that every person, bodies or authority acting under the law acts within the boundaries set by the Constitution and statute.

Determination and disposition

10. I have considered the pleadings and arguments and I think this matter can easily be disposed of on the basis of the decision of Justice Makhandia in ***Peter Ochara Anam & Others v Constituencies Development Fund Board and Others (Supra)*** where he 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 and 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 trivialise 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.*”

11. These sentiments were reiterated by Justice Musinga in ***Hassan Shiano and Others v National Committee of the Constituency Development Fund and Others (Supra)***. More recently in the case of ***Abdi Gulia Adan & Others v Chairman Mander West Constituency Development Fund Committee, Nairobi Petition No. 189 of 2012 (Unreported)***, I stated, “[7] *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.*”

12. The petitioner’s case is largely a complaint against the manner in which the Committee runs its affairs and in view of the statutory scheme, it is most appropriate that the mechanisms established by the legislature be allowed to work as contemplated. This is the principle enunciated in a long line of cases; ***The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, Wanyoike v Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43.*** *Although the cases concern the electoral process, the principle that where the Constitution or a statute has established a dispute resolution procedure then that process must be used, is of universal application.* The mere fact that the Constitution is cited or invoked is not enough to elevate the matter to a Constitutional matter and confer a licence to the High Court to inquire, investigate, arbitrate, surcharge or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by statute.

13. The insistence on following statutory procedures is also an imperative of the Constitution. **Article 159** provides that the courts shall promote alternative forms of dispute resolution. In ***Francis Gitau Parsiemi and Others v National Alliance Party and Others (Supra)***, I observed that, “*In my view, this insistence of a specific procedure is not inconsistent with the Bill of Rights; it is recognition that election rules require special rules for determination. These rules are justifiable in a democratic society and the Constitution itself contemplates that the electoral process is a special process.*” These sentiments apply with equal force to the circumstances of this particular case.

14. Transparency, accountability, good governance, which are values cited by the petitioner to support his case, are achieved through processes, mechanisms and institutions working in accordance with the Constitution. I would hasten to add that these values are not for the High Court alone to apply for the collective effect of **Article 2(1)** on the supremacy of the Constitution, **Article 10** on the National values and principles of governance and **Articles 19** and **20** on the applicability of the Bill of Rights, amongst other provisions, show that all persons, state and public officers must apply the Constitution when

exercising authority given by the Constitution and the law.

15. I must comment on the case of ***Trusted Society of Human Rights Alliance v The Attorney General (Supra)***. It is correct to state that the case dealt with integrity and what it entails and its place within the constitutional framework. But the case did not deal with these issues in a vacuum, it dealt integrity within a process of the nomination and selection of a candidate for the position of the Chairperson of the Ethics and Anti-corruption Commission. The court interrogated the process and found that it was wanting in certain respects and it therefore intervened. The Court in that case did not purport to take upon itself the process of assessing, nominating and appointing a specific candidate for the position. What the petitioner in this case requires the court to do is to act as the auditor general, make specific finding against the respondents, surcharge them, remove them from office and thereafter declare them unfit for office.

16. The petitioner relies on two letters support to its case that it has invoked the dispute resolution procedure under the Act. The letter dated 28th July 2009 is from the Kwitu Development Forum addressed to the CEO of the Constituencies Development Fund. Although the letter alleges “*serious pitfalls which need to be proven thus the need for the audit.*” It is in substance a request for information to enable the Forum conduct a public audit. The letter dated 30th July 2012 from the petitioner is addressed to the Secretary/CEO of the Ethics and Integrity Commission. It is not a letter to the Board but it is copied to the National CDF Secretariat requesting the Commission to investigate embezzlement. In my view, the two letters are not in substance complaints addressed by the petitioner to the Board to resolve the dispute in terms of **section 52** of the Act.

17. I am satisfied that the petitioner has not invoked the dispute settlement procedure provided for in the Act and I take the drastic but necessary step of striking out this petition to enable the petitioner pursue his complaint in accordance with the prescribed procedure under the **section 52** of the ***Constituencies Development Fund (Amendment) Act, 2003***.

18. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 11th day of December 2012

D.S. MAJANJA

JUDGE

Mr Havi with him Mr Toiywa instructed by Havi and Company Advocates for the petitioner.

Mr W. Kamau, Senior Litigation Counsel, instructed by the State Law Officer for the 1st respondent.

Mr Naikuni instructed by Naikuni, Ngaah and Miencha Advocates for the 2nd and 3rd respondents.

Mr W. Gatonye with him Mr Kilonzo and Mr Malonza instructed by Waweru Gatonye and Company Advocates for the 3rd, 4th, 5th, 6th, 7th and 8th respondents.