



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 189 of 2012

ABDI GULIA ADAN PETITIONER

AND

THE CHAIRMAN, MANDERA WEST CONSTITUENCY

DEVELOPMENT FUND COMMITTEE 1ST RESPONDENT

MANDERA WEST CONSTITUENCY

DEVELOPMENT FUND 2ND RESPONDENT

CONSTITUTENCY DEVELOPMENT

FUND BOARD 3RD RESPONDENT

JUDGMENT

1. This is a matter concerning the Constituency Development Fund (CDF) for the Mandera West Constituency and the petitioner is aggrieved by the manner in which money from the Fund is distributed in the constituency.

2. When the matter came up for hearing today, 3rd December 2012, I declined to adjourn the matter for three reasons. First, the matter had been filed under certificate of urgency on 8th May, 2012 and the petitioner had not filed written submissions despite court orders to do so. At any rate, there were none in the court file. Second, the management of CDF is ultimately tied to the parliamentary cycle and thus the term of the management of the CDF Committee will soon come to an end. Third, the matter concerns management of public funds and it would not be in the interests of justice to drag on the matter. Fourth, when the matter was called out at 10.45am, there was no appearance for the petitioner. In the circumstances, I heard the respondents' advocates in opposition to the petition.

3. The petitioner is a resident of Malkamari Ward, Malkamari Division of Mandera West Constituency. He brings this petition on behalf of the residents of Malkamari and Guba Wards. In essence, he complains about the manner in which the money disbursed to the Constituency from the CDF has been distributed. In the Amended Petition dated 14th May, 2012, he avers that the residents of Malkamari Division have been isolated and marginalised and he seeks the following reliefs:

a) *A declaration that residents of Malkamari Division are entitled to an equitable share of the Mandera West Constituency Development Fund*

- b) *A declaration that the distribution of Ksh. 231,066,904(Two Hundred Thirty One Million Sixty Six Thousand Nine Hundred and Four) so far received by the Mandera West Constituency is unconstitutional and a breach of the constitutional rights of the residents of Malkamari Division.*
- c) *A declaration that Malakamari Division is entitled to one quarter of the Ksh. 231,066,904(Two Hundred Thirty One Million Sixty Six Thousand Nine Hundred and Four) as released.*
- d) *An order that of the funds now released for the current financial year such portion as will take the share of Malkamari Division to at least a quarter of the total sums so far received be set aside and disbursed to projects in Malkamari Division.*
- e) *An injunction to restrain the Respondents, members of the Manadera Constituency Development Fund Committee, their agents, servants and or employees from disbursing development funds to the other Divisions of Mandera West Constituency except Malkamari Division unless and until up to one quarter of the total so far received is disbursed to Malakamari Division.*
- f) *Such orders and directions as this Honourable court deems fit and just to grant.*

4. The petition is opposed by the 1st respondent, the Chairman of the Constituency committee, who has sworn an affidavit on 28th May, 2012. The thrust of his deposition is that, the petitioner himself was a member of the Committee and as such he participated in the activities of the Committee. He avers that the projects implemented by the Management Committee are not done in an arbitrary manner but are determined in accordance with the needs of population of the area, taking into account other resources from government streams to avoid duplication of projects.

5. The 2nd and 3rd respondents also oppose the application and support the 1st Respondent's contentions. The respondents' view is that this case is premature and the procedure laid down in the Act ought to have been followed. All the respondents through their counsels, drew the court's attention to the provisions of **section 52** of the *Constituencies Development Fund Act, 2003 (as amended in 2007)* which states 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.

6. I have considered the pleadings and depositions in the matter and I take the following view of it. This is an application under **Article 22** of the Constitution to enforce fundamental rights and freedom. It has always been the Court's position that the right of access to the court to enforce fundamental rights and freedoms should not be unnecessarily or unreasonably hindered as this would undermine the Bill of Rights. However, this view is not inconsistent with the provisions of **Article 159(2)** which empowers the court to promote alternative dispute resolution procedures.

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.

9. There is no indication that, in fact the statutory procedure was adopted or invoked to pursue this claim. In the circumstances, I find this claim premature. In light of what I have stated, I find and hold that the Petition is premature and it is hereby struck out with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of December 2012.

D.S. MAJANJA
JUDGE

Mr A. Ingutya instructed by Arthur Ingutya & Co. Advocates for the petitioners.

Mr H. Lakicha for instructed by Hassan N. Lakicha & Company Advocates for 1st and 2nd respondents

Mr Omino instructed by Abuodha & Omino Associates for the 3rd respondent.