REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO. 3 OF 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER CHAPTER FOUR, ARTICLES 19, 20, 21, 22, 23, 25, 27, 32, 33, 35, 36, 43, 46, 48, 50 AS READ WITH CHAPTER SIX, ARTICLE 232, CHAPTER SEVENTEEN ARTICLES 258 AND 259, AND CHAPTER EIGHTEEN, ARTICLE 262 AS READ WITH SIXTH SCHEDULE, PART 5, SECTION 19 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUENCIES DEVELOPMENT FUND (AMENDMENT) ACT, NO. 16 OF 2007

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT

BETWEEN

PETER OCHARA ANAM…….....1st PETITIONER

SAMMY JURA ONYURO…….....2nd PETITIONER

TOBIAS OKINYI OUMA…….....3rd PETITIONER

DAVID ADENDI ODHU Petitioning on their own behalf as Kenya citizens, Nyatuje Constituents and as representativesof Nyatike Constituency inhabitants and for and on behalf of Nyatike Constituency....4th PETITIONER

-VERSUS-

CONSTITUENCIES DEVELOPMENT FUND BOARD …….....1st RESPONDENT

NYATIKE DEVELOPMENT FUND COMMITTEE …….....2nd RESPONDENT

EDICK PETER OMONDI ANYANGA …….…….....3rd RESPONDENT

HON. ATTORNEY GENERAL ……. …….....4th RESPONDENT

AND.

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

RULING

The petitioners mounted the instant petition on 10th November, 2010 in which they sought various declarations and orders that can be summarized in six broad categories.

- **Declaration that the alleged failure by the 2nd and 3rd respondents to allocate or release funds to certain projects in Nyatike Constituency amounts to discrimination against them.**

- **Declaration that money belonging to Nyatike Constituency Development Fund has been misused by the 1st, 2nd and 3rd respondents.**

- **Declaration that the respondents have breached the provisions of the Constituencies Development Fund Act, 2007, Public Procurement and Disposal Act, 2005 and the Anti-Corruption and Economic Crimes Act.**

- **Declaration that the 3rd respondent, Agnes Odhiambo, Tom Maruti, Elijah Owino and all members of the 2nd respondent are unfit to hold public office and should be removed.**

- **Declaration that by allegedly refusing to carry out investigations on alleged complaints involving Nyatike Constituency Development Fund, the interested party had denied the people of Nyatike equal protection of the law and finally,**

- **Declaration that section 52 of the Constituencies Development Fund Act, 2007 is in conflict with articles 22 (1), 23, 48 and 50 of the Constitution and therefore null and void.**

It is clear from the voluminous petition and the annextures thereto covering 436 pages that the petitioners who are all constituents of Nyatike Constituency are not happy with the manner in which the Nyatike Constituency Development Fund is being run. No doubt there are local political undertones in some of the allegations. Indeed the petitioners have not hidden what has informed the petition and on whose behalf they have mounted it. They have brought the petition on their own behalf as Kenya citizens, Nyatike Constituents and as representatives of Nyatike Constituency inhabitants and for and on behalf of Nyatike Constituency. Those sued as respondents are **the Constituency Development Fund Board**, **Nyatike Constituency Development Fund Committee**, **Edick Peter Omondi Anyanga**, the current Member of Parliament for the Constituency, the **Attorney General** and **Kenya Anti-corruption Commission** as the interested party.

Contempreneously with the filing of the petition, the petitioners took out a chamber summons application under a certificate of urgency pursuant to article 23 of the Constitution of Kenya and rules 20,

21 and 32 of the **Constitution (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual)** High Court **Practice and Procedure Rules**. In the application, the petitioners sought various conservatory orders in the nature of injunctions directed at the 1st respondent restraining it from releasing to the 2nd respondent, the Constituencies Development Funds (CDF) meant for Nyatike Constituency for the financial year 2010/2011 pending the hearing and eventual determination of this application interpartes and thereafter pending the hearing and final determination of the petition, there be a freeze of the operations of the designated constituency fund account held at Co-operative Bank, Migori branch pending the hearing and final determination of the petition, an order that any aspects of Nyatike CDF funds should not be used to defend these proceedings by the 2nd and 3rd respondents respectively in any event, the 2nd, 3rd respondents and **Tom Maruti**, District Development Officer, Migori, **Elijah Owino**, the District Accountant, Migori who are the mandatory signatories to the Nyatike CDF account be made to fully account to the last cent, for the CDF received in Nyatike Constituency for the financial years 2007/2008, 2008/2009, 2009/2010 before further disbursements to the designated constituency fund account is made by the 1st respondent, an order be made directed at the interested party to investigate all proposed, approved and funded projects for constituency for the aforesaid financial years, a conservatory order directed at the 1st and 2nd respondents to complete and release payments to the projects proposed, approved, funded, started but abandoned, an order that all the 16 locations in the constituency do receive their share of CDF based on the principles of equitable distribution of the available resources and genuine need as is required by law and not on the aspects of open nepotism, discrimination, favouritism and bias currently being practiced in the constituency. Finally the petitioners prayed that costs of the application be borne by the 3rd respondent personally. To my mind, some of those prayers border on the absurd.

The application was anchored on nineteen grounds and was also supported by the affidavit sworn by the 1st petitioner on his own behalf and on behalf of the other petitioners. The grounds and the supporting affidavit aforesaid merely elucidated and elaborated on the complaints of the petitioners as set out in the petition and the affidavit in support thereof.

When the application was presented before me on 10th November, 2010 at the ex-parte stage, I certified it urgent and directed the registry to set it down for interpartes hearing on priority basis. So that the only prayer in the application granted at the ex-parte stage was the first one. I declined in other words to grant any of the other prayers sought in the application in the interim. Those remaining prayers are therefore the subject of this ruling.

The application was duly served on the respondents in the fullness of time. Among the respondents to first take on the petitioners was the 2nd respondent. He was followed by the 3rd and the interested party in that order. They all filed notices of preliminary objection to the application and to the entire petition in terms that:-

- **The application and petition were legally untenable.**

- **Petitioners lacked any special or direct interest in the issues raised and are therefore devoid of requisite locus standi.**

- **2nd respondent was not a body corporate capable of suing and being sued.**

- **The application and petition were unconstitutional.**

- **Suit violated the doctrine of separation of powers.**

- **Jurisdiction of the court to grant the prayers sought is divested and or ousted by the provisions of section 9, 16, 17, 23(4), 30 and 52 of the Constituencies Development Act. The jurisdiction of this court too to grant prayer (g) of the application was ousted by the provisions of**

section 10 of the Anti-Corruption and Economic Crimes Act, the petitioners were non-suited, otherwise the application was scandalous, frivolous, vexatious and an abuse of the due process of the court.

- **The petition had not set out with reasonable precision, the particular provisions of the Constitution which have been infringed.**

- **The interested party is pursuant to the mandatory provisions of section 10 of the Anti-Corruption and Economic Crimes Act not subject to the directions or control of any other person or authority while discharging its statutory mandate and cannot therefore be directed on when, who and what to investigate as contemplated by the petitioners.**

- **The petition trivialized the court's constitutional jurisdiction by needlessly invoking the same when there were dispute resolution mechanism provided for under the Constituencies Development Fund Act. This court's Constitutional Jurisdiction should not be invoked where there are remedies provided by statute.**

The respondents and interested party did not follow up the foregoing with filing any other papers in opposition to the application. But in my view the determination of the application and the fate of the petition shall turn on the question of jurisdiction.

The application came up for interpartes hearing before me on 30th November, 2010. However respective parties with the urging of the court agreed to canvass the preliminary objections first by way of written submissions. The same were subsequently filed and exchanged. I have since carefully read and considered them alongside cited authorities.

It is trite law that a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are objections to the jurisdiction of the court as in this case, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. This too may have a bearing to this petition. This is what **Law JA** said in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) 1 E.A 696**. In the same authority, **Sir Charles New bold P** is quoted as saying, ***"… The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points of law by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop…".***

The case for the respondents' and interested party is that the disbursements and usage of constituency development funds, are governed by the **Constituencies Development Fund Act**, 2003 and the **Constituency Development Fund, Amendment Act**, 2007. Under the said **Acts**, any dispute, issue or complaint pertaining to the disbursement, procurements of tenders and usage of CDF, and which forms the bulk of the complaints in this petition is by law required to be lodged and or forwarded to the 1st respondent, who then investigates in the first instance and where necessary refer the dispute for arbitration to a panel to be constituted and or appointed by the minister for finance. Besides, it is also a pre-condition that all disputes touching or concerning the CDF, must be referred to arbitration before and prior to the same being mounted in court. However, in the instant case, the petitioners had come to court without first complying with the requisite statutory conditions. The existence of the arbitration clause therefore, deprives this court of jurisdiction to entertain or adjudicate upon the subject dispute. To the respondents therefore this matter being purely a matter of law and goes to the jurisdiction of this court qualifies to be raised and dealt with by way of preliminary objection. Accordingly their preliminary objections were well grounded.

The petitioners' take however is that by merely looking at what a preliminary objection ought to be, the respondents' points of objections ought to be dismissed ***suo motto***. That this petition is neither a criminal nor civil proceedings to which the **Civil Procedure Act** and **Rules** made thereunder apply, but a special jurisdiction created and governed by the constitution itself. Therefore, principles like revelation of reasonable cause of action, competence of the suit, abuse of the court process, ***locus standi*** and misjoinder do not apply. Moreover article 159(1) of the Constitution provides that in exercising judicial authority, the court and tribunals shall be guided by the principles that justice shall be done to all, irrespective of the status, justice shall not be delayed and shall be administered without undue regard to procedural technicalities. Finally, it is the position of the petitioners that the subordinate dispute resolution tribunal contemplated under the CDF is incompetent, ineffective and undesirable as it cannot determine the constitutional issues raised in the petition which is a preserve of the High Court, nor grant the declarations sought. This court should therefore strive to preserve the petition for hearing on the merits by rejecting the objection. To hold otherwise is to abdicate the Constitutional mandate given to this court under the constitution.

Yes, the constitution has provided that justice shall be administered without undue regard to procedural technicalities. However I do not understand this provisions as ousting all the rules of engagement as we know them in Civil and Criminal proceedings. These proceedings may be special but like every proceeding, it must have rules by which it should be canvassed. One cannot play football without rules otherwise it will cease to be football and perhaps become another game all together. If we do not have basic rules of engagement, of what use will be Constitutional Petitions or references if they are turned into panaceas for all legal problems that the citizens of this country may have or imagine? I do not think that the Constitution was meant to replace statutes that provide remedies to those concerned.

Statutes such as the **Co-operative Societies Act**, **Rent Restriction Act, Land Disputes Tribunals Act, Arbitration Act, Landlord and Tenant (shops, Hotels and Catering establishments) Act** which have inbuilt and established dispute resolution mechanisms outside the constitution were rendered otiose by the stroke of the new Constitution. These acts have not been repealed and as long as they are not inconsistent or repugnant to the Constitution, they continue to apply and should be applied to resolve disputes akin to them. I do not see anything void or repugnant if the dispute herein was first forwarded to the 1st respondent for resolution as required by section 52 of the **Constituency Development Fund Act**.

In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in vaccum.

The issue raised by the respondents is not a mere procedural technicality. It goes to jurisdiction. Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid. I do not however agree that the bodies created under the provisions of the CDF such as the 1st respondent are invalid, null and void as per the constitution. As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the petitioners the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the **Act**, like the instant dispute. The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore

be the case of the petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of the Constitution. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court.

There must have been a reason why it was found necessary to insert section 52 in the CDF. It was I believe to guard and weed out frivolous and, misconceived suits such as this considering the pleadings and prayers sought which boarder on the absurd. Bearing in mind that CDF being a brain child of politicians and has remained so to date, it, was bound to elicit unnecessary disagreements between the governer, that is to say, the Member of Parliament and the governed, say the constituents in particular those who belong to the opposing camps. It makes or breaks a politician. If what has been pleaded in this petition is anything to go by, it reflects vividly the political undercurrents in that constituency. It is quite clear that the petitioners do not belong to the same political camp as the 3rd respondent who is their Member of Parliament and who holds the purse and strings to the CDF kitty. It is also clear that those who contested against him during the last general elections and lost to him seem to have ganged up with the petitioners in abid, I believe to settle political scores with the 3rd respondent by mounting this petition. I do not think that this petition was filed in good faith. The allegations made against the respondents amount to criminality. Yet nowhere in the petition have they stated that they reported the incidentes of fraud, corruption, misappropriation, or misuse of funds they have attributed to the respondents to the police, the 1st respondent or even the interested party for action and if so with what results.

I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.

Section 52 of the **Constituencies Development Fund Act**, 2003 as amended by **Act** No. 16 of 2007 provides categorically that:-

"…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 are referred to court…".

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. In the case of **Harrikson –vs- Attorney General (1979) WLR 62**, the Privy Council held:-

"…The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individuals by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action…".

In the case of **Bahadur (1986) LRC (Const) 297 (from Trnidad & Tobago)**, the court said:

"…The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the

proper cause is to bring the claim under that law and not under the constitution…",

And in **Ben Kipeno & 6 others –vs- Attorney General & Another (2007) eKLR, Wendoh J.** held and rightly so in my view that:

"… In the instant case, the petitioners had a remedy provided by a statute right of appeal under section 130 of the EMC Act but instead the petitioners chose to come to this court, thus abusing its process. Section 84 of the Constitution can only be invoked when one has a constitutional right that is violated. It s not meant for every contravention falling under other statutes otherwise the EMC Act or any other procedure provided under other statutes would be rendered useless if parties were to transform every contravention into a constitutional issue...".

This is what has exactly happened in the circumstances of this case. The petitioners may argue that the aforesaid authorities were decided long before our current and most liberal Constitution was promulgated and therefore those pronouncements are inapplicable. Nothing can further from the truth. The constitutional issues raised in those authorities, are as true and alive today as they were when those decisions were rendered. Our current Constitution did not outlaw resort to other statutes for redress where available other than the constitution. I would therefore adopt and hold those pronouncements as representing good law.

The petitioners grievances arising from any breach of the provisions of the CDF, could have been adequately addressed by the dispute resolution mechanism provided for under the **Act**. Section 52(1) which is set out in mandatory terms provides that, all complaints shall be forwarded to the board and section 52(2) provides interlia, disputes shall be referred to the board in the first instance and where necessary on arbitration panel shall be appointed by the minister who shall consider and determine the matter before the same is referred to court. In the light of the foregoing this petition as well as the application must fail for want of jurisdiction. Besides, it must also fail on the grounds that it is frivolous, vexatious and aimed at trivializing redress by way of constitutional petition or reference.

Way back in April, 2005 **Warsame J** in **John Onyango Oyoo & 5 Others –vs- Zadock Syongo & 2 Others KSM HC Misc. Appl. No. 352 of 2004 (UR)** said, the following regarding the **Constituencies Development Fund Act**: ***"…It is an Act that perpetuates the sitting member of parliament wish to sustain and retain his/her privileged role/position in terms of accountability yardstick. The fear is eminent that this particular Act would open a floodgates to busy bodies or disgruntled elements to swamp the court with unnecessary litigation…".*** This warning has come to pass if the complaints in this petition are anything to go by.

The upshot of all the foregoing is that the preliminary objection on jurisdiction is sufficient to dispose off the petition and the application. They were properly taken. I need not therefore consider the competence of the petition as against the 2nd respondent, constitutionality of the petition, disclosure of a reasonable cause of action, alleged breach of **Public Procurement And Disposal Act**, removal of the 3rd respondent from office or that of **Agnes Odhiambo**, **Tom Maruti**, **Elijah Owino** all members of the 2nd respondent and the alleged refusal by interested party to carry out investigations.

In the premises the petition and application fail and are accordingly struck out with no order as to costs.

Ruling dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE