



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 82 OF 2010**

**IN THE MATTER OF ARTICLE 73(1) (a), (b) (2) (c), ARTICLES 232 (a, b, c, d, e, f, i) (2), 43 (IN ITS ENTIRETY) AD**

**ARTICLE 48 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUENCIES DEVELOPMENT FUND ACT, 2003**

**AND**

**IN THE MATTER OF THE ISIOLO NORTH CONSTITUENCY DEVELOPMENT FUND**

**IN THE MATTER OF ALLEGED CONTRAVENTION, VIOLATION, INFRINGEMENT AND OR THREAT TO INFRINGE OR**

**VIOLATE THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL TO WIT**

**ARTICLES 43 (IN ITS ENTIRETY), OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

- 1. HASSAN SHANO**
- 2. LIBAN GOLICHA**
- 3. ISMAIL ALI GALMA**
- 4. WASO TRUST**

**LAND.....PETITIONERS**

**AND**

1. THE NATIONAL COMMITTEE OF THE CONSTITUENCY DEVELOPMENT FUND.....1<sup>ST</sup> RESPONDENT
2. THE CONSTITUENCY DEVELOPMENT FUND FOR ISIOLO NORTH CONSTITUENCY.....2<sup>ND</sup> RESPONDENT
3. THE MEMBER OF PARLIAMENT FOR ISIOLO NORTH CONSTITUENCY.....3<sup>RD</sup> RESPONDENT

**RULING**

The petitioners filed a petition dated 23<sup>rd</sup> November, 2010 and sought the following orders:

- “(a) That the respondents provide public comprehensive audit of all the Constituency Development Funds allocated to Isiolo North Constituency up to date.
- (b) A declaration that the application, use and disbursement of the CDF funds Isiolo North Constituency have not complied with the constitution and the CDF Act.
- (c) A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are therefore unfit to control, transact or in any deal with the Isiolo North Constituency CDF.
- (d) An order that the 1<sup>st</sup> respondent in consultation and concurrence of the petitioners and residents of Isiolo North Constituency do appoint a new team of CDF Managers for Isiolo North Constituency.
- (e) That the costs of this petition be borne by the respondents.
- (f) In the alternative and without prejudice to prayer (e) above, in the event that the petition is lost the petitioners, for bringing this petition in the public and community interest be spared from payment of any costs.”

Together with the petition the petitioners filed an application seeking orders that:

“1. ....

2. The respondents herein be and are hereby restrained by themselves, agents, representatives or assigns from in any way operating, transacting, withdrawing from in any way making payments from the Isiolo North Constituency Development Fund Bank Account Number 0120048127501, Consolidated Bank of Kenya held in Isiolo Branch or any other account holding Isiolo North Constituency Development Fund monies until the final hearing and determination of the petition.
3. The 1<sup>st</sup> respondent be and is hereby restrained to from (sic) approving the disbursement for disbursing any additional funds for to (sic) the Isiolo North Constituency Development Fund for the year 2010/11 until the determination of the petition herein.

#### 4. Costs be in the cause.”

The application was opposed by the respondents who filed affidavits in response thereto. One of the objections taken by the respondents is that this court lacks jurisdiction to hear and determine the petition and the application in view of the provisions of **Section 52(1) (2) and (3) of the Constituency Development Fund Act, 2003** 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.**

**(3) Subject to this Act, no person in the management of the fund shall be held personally liable for any lawful action taken in his official capacity or for any disputes against the fund.”**

Jurisdiction is everything and without it any orders made by a court are null and void. Whenever the court’s jurisdiction is challenged that issue must be determined at the earliest instance and if the objection is sustained there would be no basis of proceeding with the matter any further.

The respondent’s contention is that the petitioners should have presented their complaint first to the Board. The next hierarchy would have been arbitration and finally the court. The provisions of the section are express and unambiguous.

I agree with the respondent that the intention of Parliament in enacting the said section was to make the court the last arbiter where the Board and/or arbitrators have been unable to resolve a complaint regarding operations of a constituency development function under the Constituency Development Fund Act. The petitioners did not make any complaint to the Board before bringing their petition to this court. In **PETER OCHARA ANAM & OTHERS vs CONSTITUENCY DEVELOPMENT FUND BOARD & OTHERS**, **Constitution Petition No. 3 of 2010 at Kisii**, Makhandia J, commenting on the provision of **Section 52 of the Constituency Development Fund Act, 2003**, held 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 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 1<sup>st</sup> 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.”**

I agree entirely with the said sentiments. I find and hold that in view of the petitioners breach of **Section 52** of the said **Act** this court lacks jurisdiction to hear and determine their complaints. The petitioners’ complaints must first be referred to the Constituencies Development Fund Board.

Having come to that conclusion, I do not need to consider any of the other grounds raised by the parties. I dismiss the petition and the application but with no order as to costs. This is in view of the fact that the petitioners may not have been advised accordingly by their advocate and in any event were pursuing public interest matters on behalf of the people of Isiolo North Constituency.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE, 2011.**

**D. MUSINGA**

**JUDGE**

**In the Presence of:**

**Nazi – Court Clerk**

**Mr. Mubea for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**No appearance for the Petitioners**