



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO.232 OF 2011

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER OF CERTIORARI BY CRISPIN OUMA ONANG'O AND DORIS NYABOKE NYABERA

AND

IN THE MATTER OF SECTION 23 OF THE CONSTITUENCY DEVELOPMENT FUND ACT, ACT NO. 10 OF 2003 AND RULES 12(2) AND 13 OF THE CONSTITUENCY DEVELOPMENT FUND REGULATIONS, 2004 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 31, 32, 33, 38 AND 43 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, CAP 412C,

LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT CAP.26 LAWS OF KENYA

AND

IN THE MATTER OF THE JUDICATURE ACT CAP. 8

LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53, RULE 1 OF THE CIVIL PROCEDURES RULES

BETWEEN

CHRISPIN OUMA OBNANG'O

DORIS NYABOKE NYABERAAPPLICANTS
VERSUS

HON. ELIZABETH ONGORO,

MEMBER OF PARLIAMENT KASARANI CONSTITUENCY.....1ST RESPONDENT

THE CHIEF EXECUTIVE OFFICER

CONSTITUENCY DEVELOPMENT FUND BOARD.....2ND RESPONDENT

RULING

The application for my determination is the Notice of Motion dated 3rd October, 2011 brought under Order 53 Rules 3(1) & (2) and 4(1), (2) and (3) of the Civil Procedure rules, 2010 and all other enabling provisions of the law. It seeks the following order:

- (i) THAT an Order of certiorari directed to the respondents and quash the decisions of the 1st and 2nd respondents made on 20th July 2011 and 21st July 2011 respectively or any other date removing the applicants from office as Kasarani constituency Development fund Committee members and replacing or amending the records at the Constituency Development Fund Board Secretariat and all or any other decision, minutes and or proceedings approving, recommending and or authorizing the removal of the applicants from office as Kasarani Constituency Fund Committee members.

The application is based on the following grounds:

(ii) That the applicants removal from office as members of the Kasarani Constituency Development Fund Committee members by the 1st respondent as approved by the 2nd respondent is tainted with illegality, irregularity, malice, capriciousness, vengeance, bad faith, bias, unfairness, abuse of office and in contravention of established tenets of the Rules of Natural justice.

(iii) THAT the apparent irregularity and illegalities on the commission and omissions of the respondents renders their actions a monumental procedural and substantive legal nullity, invalid and void ab initio candidate and subject of judicial review orders of Certiorari.

(iv) THAT unless the orders sought herein are granted, a dangerous and unjust precedent shall have been established giving way to future abuse of office and due process of law.

The basis of the applicant's application is that they were appointed as members of Kasarani Constituency Development fund Committee on or about 26th February 2010. The 1st applicant was elected as a chairperson while the 2nd applicant was elected as a treasurer. They held that office until the 1st respondent wrote to the 2nd respondent purporting to inform him of the termination and replacement of both the applicants which was accepted and rectified. The applicants being aggrieved with the decision of the respondents brought an application before this court seeking an order of certiorari seeking;

1. THAT the applicant be granted leave to seek Judicial Review orders to wit:-

1.1 An ORDER of CERTIORARI directed to the respondents and quash the decisions of the 1st and 2nd respondents made on 20th July 2011 and 21st July 2011 respectively or any other date removing the applicants from office as Kasarani Constituency Development Fund Committee members and replacing or amending the records at the Constituency Development Fund Board Secretariat and all or any other decision, minutes and or proceedings approving, recommending and or authorizing the removal of the applicants from office as Kasarani Constituency Development Fund Co0mmittee members.

1.2 An Order that grant of leave herein do operate as stay of all the operations duties or functions of the Kasarani Constituency Development Fund Committee as undertaken by the appointees of the 1st respondent made on or about 20th July 2011, the appointees assumption of office and a freeze on withdrawals of monies on any or all the Bank accounts relating to the Kasarani Constituency Development Fund, including the main account situate at Cop-operative Bank of Kenya, Parliament Road Branch and the Kasarani Project Management Committee's Bank Account wheresoever situate or domiciled in any bank within the Republic of Kenya.

Leave was granted on 30th September 2011. It was also ordered that the leave granted do operate as a stay limited to freezing and/or withdrawal of any or all monies in all bank accounts relating to the Kasarani CDF pending the hearing and determination of the main Motion.

As was rightly pointed out by the advocate for the applicants, the removal and replacement of the applicants on the 20th July 2011 by the 1st respondent and as ratified by the 2nd respondent on 21st July 2011 is the genesis and the basis of the proceedings before this court. It is the position of the applicants that the commissions and omissions of the respondents jointly and severally was illegal, irregular, un-procedural, unfair, malicious and an abuse of authority or power. It is also the contention of the applicants that the appointments is underpinned under section 23(7) of the CDF Act of 2003 and as amended in 2007 which states as follows;

“The term of office of the members of the constituency Development Fund Committee shall be three years renewable but shall come to an end upon the appointment of a new Constituency Development Fund Committee in a manner provided for in this Act.”

The position of the 1st respondent is that it is normal for a committee member to be replaced with others or retained and that she followed the correct procedure and protocol in removing the applicants. She contended that she came to learn that the applicants were not reporting either to her or to the other committee members about certain raised queries relating to unauthorized projects and altering of committee minutes. She also states that she was reliably informed that there was an intentional misrepresentation of facts and multiplication of minutes committed by the applicants. She also checked with the bank and confirmed that there were irregular payments made out by applicants and after ascertaining that the applicants were not acting for the interests of the fund and people of Kasarani, she made a decision to remove them as committee members and as officials of the constituency Development Fund.

The question for my determination is simple and straightforward and it is whether the 1st respondent exceeded her powers in removing the applicants as officials of Kasarani Constituency Development Fund and secondly whether the appointment of applicants is statutorily underpinned by virtue of section 23(7) of the CDF Act as amended in 2007. I have considered the submissions and all the supporting affidavits and replying affidavits filed by the parties. Under section 23(1) of the Constituencies Development Fund Act known as Act No.3 of 2003, there shall be a Constituency Development Fund for every constituency. The said committee is to be constituted and convened by the elected Member of Parliament of that particular area. The said section sets the limit of the members who shall be fifteen (15) members comprising of;

- (1) The elected member of parliament
- (2) Two councilors in the constituency
- (3) One District Officer in the constituency
- (4) Two persons representing religious organizations in the constituency.
- (5) Two men representatives from the constituency.
- (6) Two women representatives from the constituency.
- (7) One person representing the youth from the constituency.
- (8) One person nominated from among active NGOs in the area if any.

Section 23 has six subsections and none of the said sections mentioned the period or the time the said Constituency Development Committee members are to serve. It is the contention of the applicants that section 23(7) requires that the committee shall serve for a period of three years and the term can be renewed. Section 23(7) came as a result of amendment that was carried out on Act No.10 of 2003 in 2007. The amendments to the CDF Act No.10 of 2003 was effected through Act No.16 of 2007. However, the amendments brought about by Act No.16 of 2007 could only come into operation after the necessary commencement date was given. The said Act was coming into operation by Notice.

I have clearly and meticulously considered whether Act No.16 of 2007 had been given a commencement date but unfortunately it was not given a commencement date, therefore, it has not been operationalized. The lack of commencement date means that Act No.10 of 2003 remains intact without any alterations, additions and/or amendments. As clearly stated, Act No.10 of 2003 does not set the term of office of the members of the constituency Development Fund Committee. It therefore means the area Member of Parliament retains the power to remove and hire the committee members of the Constituency Development Fund. It is therefore my determination that the 1st respondent has powers

to remove any member of the area constituency fund committee in accordance with Act No.10 of 2003. In this case, I am satisfied the applicants were removed and replaced in accordance with the law. It is the contention of the 1st respondent that the applicants were removed because they were involved with misappropriation and misapplication of public funds. It is clear the applicants were not employees of the 1st respondent but they were made committee members in order to manage public funds in accordance with the law. I am therefore satisfied that the applicants were removed on reasonable grounds and in exercise of a discretion within the 1st respondent. Consequently, the application has no merits and it is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 22nd day of November 2011.

M. WARSAME
JUDGE