



**Warirah v Deputy County Commissioner, Kasarani Sub County, Nairobi County & 3 others  
(Environment & Land Case 119 of 2020) [2022] KEELC 3442 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3442 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 119 OF 2020**

**LN MBUGUA, J  
JULY 21, 2022**

**BETWEEN**

**REUBEN MAGANDU WARIRAH ..... PLAINTIFF**

**AND**

**DEPUTY COUNTY COMMISSIONER, KASARANI SUB COUNTY, NAIROBI  
COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND  
BOARD ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Coming up for determination is an application dated January 10, 2022 by the 4<sup>th</sup> defendant which was argued orally on 2<sup>nd</sup>, 8<sup>th</sup> and June 9, 2022. The Applicant seeks the following orders:
  - i. That the honourable court be pleased to strike out the name of the 4<sup>th</sup> defendant / applicant from the proceedings herein.
  - ii. That the costs of the proceedings and this application be borne by the plaintiff.
2. This application is premised on the grounds on the face of the application and on the supporting affidavit of Simon Ndweka, the Corporation Secretary. The applicant avers that they are wrongly joined in the proceedings since the Board as established under section 4 of the *National Government Constituencies Development Fund Act* lacks capacity to acquire and hold property as alleged. Adding there was no cause of action disclosed against the 4<sup>th</sup> defendant.



3. The Applicant also contested the joinder stating that the dispute resolution mechanisms espoused under section 56 of the [National Government Constituencies Development Fund Act](#) had not been explored. They further contend that the obligation of implementing projects was tasked with the Project Management Committees and not the Board as alluded to by the Respondent/ Plaintiff.
4. In their oral arguments, the Applicants reiterated the averments set out in their Application and Supporting Affidavit. Reference was made to the provisions of Section 36(1) of the [National Government Constituencies Development Fund Act](#) to buttress the point that Constituency Development Committee is responsible for implementation of projects and not the 4<sup>th</sup> Defendant. The case of [Kenafri Properties Ltd vs Ruaraka Constituency Development Fund Committee & 2 others](#) [2018] eKLR was cited where Justice Bor held that the Board had been wrongly joined as a party to the proceedings yet it does not play a direct role in the implementation of projects in the Constituency...”
5. In support of the claim that the plaintiff did not exhaust the available dispute resolution mechanisms, Counsel for the Applicant cited the provisions of section 56(1) and (3) of the [National Government Constituencies Development Fund Act](#) and section 9 of the [Fair Administrative Action Act](#). Reference was also made to the cases of [Eaton Towers Kenya Ltd vs Ken Kasinga and 5 others](#) [2022] eKLR, [Joseph Kariuki Njoka t/a Jofoko Constructors vs P. Mbogo Karanja & 2 others](#) [2019] eKLR and [Kibos Distillers Limited & 4 Others vs. Benson Ambuti Adega & 3 others](#) (2020) eKLR.
6. The respondent / plaintiff opposed this application vide their Grounds of opposition dated May 25, 2022. He stated that the suit raised a reasonable cause of action and triable issues against all the Defendants with particular reference to Paragraph 12 of the Amended Plaintiff which articulated the cause of action against the 4<sup>th</sup> Defendant.
7. The plaintiff also stated that as the registered proprietor of the suit property, the Defendants did not outline how they acquired the said property and went on to put up a perimeter wall on it, which amounted to compulsory acquisition without compensation. Adding that the 4<sup>th</sup> Defendant had an obligation to explain their presence on the suit property.
8. The plaintiff noted that the 4<sup>th</sup> Defendant is a body corporate with perpetual succession and was capable of suing and being sued as provided in the [National Government Constituencies Development Fund Act](#); as such, the 4<sup>th</sup> defendant was a necessary party in the proceedings for court to arrive at a just determination of the matter without multiplicity of suits over the same subject matter.
9. During the oral hearing, Counsel for the Plaintiff was in agreement with the Applicant’s averments that section 56 of the [National Government Constituencies Development Fund Act](#) provides for dispute resolution mechanisms. However, he put a rider that the disputes referred to are those arising out of administration of the CDF Act.
10. It was further submitted that order 1 rule 9 of the [Civil Procedure Rules](#) provided that no suit should be defeated by reason of non-joinder or misjoinder of parties. If at all the 4<sup>th</sup> Defendant is wrongly joined in this suit, then the Court has powers to order for substitution of the correct party. That notwithstanding, Counsel stated the Plaintiff disclosed reasonable cause and triable issues against the Defendants. That in any event, the 4<sup>th</sup> Defendant ought to explain why they built a wall bearing its name on the Plaintiff’s property. And if there was a dispute over the Plaintiff’s title, then the Defendants should also lead evidence on such an issue.
11. The plaintiff proffered the following cases to support his arguments; [Benedict Wechuli vs Navakholo Constituency Development Fund & Another](#) [2017] eKLR, [Richard Maina Mwangi vs John Kaguchia - Chairman Mukurweini Constituency Development Fund Committee & another](#) [2015] eKLR, [Peter](#)



*Kinyua Kimemia & 3 others vs Embakasi North Constituency Development Fund Account Manager & 2 Others* [2021] eKLR, *James Marienga Obonyo and 2 Others vs Fund Manager Suna West National Government Constituency Development Fund Committee & Another* [2019] eKLR in which it was submitted that in those cases it was settled that section 56 of the *National Government Constituencies Development Fund Act* didn't encompass disputes which were outside the scope of administration of the CDF Act and also did not include disputes where the Board was a party since one cannot be a judge in their own case.

12. In this regard, Counsel submitted that the dispute at hand relates to unlawful compulsory acquisition and violation of the Plaintiff's constitutional rights which were not matters for resolution under the Act. Counsel also pointed out that the dispute in question could not be arbitrated under section 56 of the aforementioned Act because the nature of the orders sought against the Defendants on the issue of compulsory acquisition and cancellation of title could not be awarded by the Board.
13. Counsel also submitted that the CDF Committee referred to by the 4<sup>th</sup> Defendant was not a judicial entity capable of suing and being sued as per the provisions of the *National Government Constituencies Development Fund Act* but the Board had the legal capacity to sue or be sued. Reference was made to the case of *Ernest Muriuki Mungai vs Gichugu Constituency Development Fund & Another* 2017 eKLR.
14. Other cases cited by the plaintiff are; *Civicon Ltd v Kivuwatt Ltd & 2 Others* [2015] eKLR which held that any party reasonably affected by the pending litigation is a necessary party, and *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* (1999) 1EA 55 which held that a party may be joined in a suit not because there is a cause of action but because their presence is necessary for the court to effectually and completely adjudicate the questions involved.

#### **Analysis and determination**

15. The issue falling for determination is whether the Applicant/ 4<sup>th</sup> Defendant should be struck out from these proceedings for being wrongly joined in the suit. In that regard, the court will deal with the question of capacity to be sued as well as the doctrine of exhaustion.
16. The Applicant claims that the respondent/plaintiff joined them in the suit without exploring alternative dispute resolution mechanisms provided under section 56(3) of the *National Government Constituencies Development Act*, that the Applicant is not the implementing authority and that the Amended Plaint did not disclose a cause of action against them.
17. The the respondent/ plaintiff on the other hand contends that the dispute at hand is of a different nature from what section 56 of the *National Government Constituencies Development Act* provides.  
Capacity to be sued
18. Section 14 of the *National Government Constituencies Development Act* provides that;  
“There is established a Board be known as the National Government Constituencies Development Fund Board.  
(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—  
(a) Suing and being sued”;
19. The above proviso puts to rest the claim by the 4<sup>th</sup> defendant that it cannot be sued.



20. I must add that in the case of *Kenafri Properties Limited* (supra) cited by the Applicant, there was a proposed construction of the Ruaraka Constituency office which had not been submitted for approvals as stipulated in the aforementioned Act. While in the case of John Muriuki Njoka (supra) (also cited by the Applicant), the dispute related to a claim of damage for breach of contract whereby the claimant had entered into a contract for a water project with an entity known as Mufu/Rukuriri which was a Runyenjes Constituency Community Development Fund project. The court held that the officials of the water project committee could not be sued in their own capacity. The dispute at hand does not in any way relate to the issue of implementation of the CDF project, it is a dispute relating to title to land.
21. As pointed out by the plaintiff, the provisions of order 1 rule 9 of the *Civil Procedure Rules* stipulate that;
- “No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
22. My conclusion on this issue is that the 4<sup>th</sup> Defendant/Applicant has capacity to sue and be sued and they are properly sued before this court.

### **Doctrine of exhaustion**

23. It is not in controversy that the provisions of section 56 of the *National Government Constituencies Development Act*, makes provisions for dispute resolution mechanisms. Subsection (1) thereof provides that:-
- “All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance...”
24. Further, sub section (3) provides:
- “Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by the consensus of the parties to consider and determine the matter before the same is referred to court...”
25. It is not in dispute that the Plaintiff did not approach the National Government Constituency Development Fund Board for the resolution of the dispute. Has he erred in failing to do so?
26. In the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR, the Supreme Court of Kenya stated that;
- “Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism. Emphasize added”.



Also see the Supreme Court case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR.

27. Certainly, this court has jurisdiction to determine disputes relating to use and occupation of and title to land as provided under article 162 (2) (b) of *the Constitution* and section 13 (2) of the *Environment and Land Court Act*. The question is whether the court should invoke the doctrine of exhaustion of remedies and proceed to exercise restraint in dealing with the dispute at hand.
28. I have considered the claim of the plaintiff where he alleges that he holds the title to the suit land, but the land has now been fenced off and there is a signage which has been put up with the wordings “Kasarani Public Grounds Funded ByCDF-KASARANI”. I have also considered the nature of the reliefs sought by the plaintiff, particularly the claim of compensation for compulsory acquisition of the suit land. It is quite apparent that the court will ultimately have to determine the category of the suit land in line with the provisions of article 62, 63 and 64 of *the Constitution*; whether the plaintiff has any proprietary interests in the said land and whether he can be compensated in relation to its acquisition.
29. It is also quite clear and correctly submitted by the plaintiff that the nature of the disputes envisaged the *National Government Constituencies Development Fund Act*(section 56) are those relating to the Administration of the aforementioned statute. The dispute herein does not concern the administration of the said statute and/or the implementation of CDF projects.
30. In light of the foregoing, I find that the issues falling for determination in the suit cannot be determined under section 56(1) and (3) of the *National Government Constituencies Development Fund Act*and or Section 9 of the *Fair Administrative Action Act*, hence the doctrine of exhaustion of remedies is therefore not applicable in this case.
31. This court is alive to the emotive nature of land disputes in the Republic of Kenya, as well as the historical challenges of land tenure systems. It is therefore important to get to the root of the problem by having all parties presenting their versions of the claims through pleadings and evidence. I also find that it is necessary to have the National Land Commission on board this ship as an interested party.

## **Rendition**

32. In conclusion I find that the application dated January 10, 2022 is not merited and the same is hereby dismissed. Costs there of shall abide the out come of the suit. In line with the provisions of order 1 rule 10 (2) of the *Civil Procedure Rules*, I direct that the National Land Commission be joined in these proceedings as an interested party. To this end, the plaintiff is directed to amend their pleadings and serve the same upon the aforementioned entity.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>st</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Edgar Lubulellah for the Plaintiff

Abidha for 4th Defendant



Court Assistant: Joan

