



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 4 of 2007

PAUL NYABERE ONUKOH & 17 OTHERS..... PETITIONERS

V E R S U S

JOEL OMAGWA ONYANCHA.....1ST RESPONDENT

BOMACHOGE CONSTITUENCY

DEVELOPMENT COMMITTEE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

J U D G E M E N T

By a Petition dated 18th January, 2007 and filed on 19th January, 2007, the petitioners sought the following orders-

(i) a declaration that the Hon. Joel Omagwa Onyancha (the First Respondent), the Bomachoge Constituency Development Committee (the 2nd Respondent), and the Hon. Attorney-General, are violating the law and the Constitution by selectively and systematically discriminating in distribution of the Constituency Development Fund in Bomachoge Constituency, contrary to the provisions of Section 82 (1) (2) and (3) of the Constitution;

(ii) A declaration that the rights and protection of the Petitioners against discrimination is so deep to be deprived and/or violated by the Respondents or any other person or authority;

(iii) an order of mandamus to compel the Respondents to comply with the legal requirements in administering and managing the Bomachoge Constituency Development Funds;

(iv) a declaration that the misallocation of public resources in Bomachoge Constituency by the First and Second Respondents amounts to embezzlement of public resources which the Third Respondent must investigate and prosecute;

(v) a declaration that all constituents of Bomachoge are entitled to a share of information and participate in the management and disbursements of their constituency development funds without restriction on the basis of clan, local connection and/or political opinion;

(v) a declaration that the Second Respondent's constitution is ultra vires the provisions of the Constituency Development Act, 2003 (No. 10 of 2003);

(vi) ***a declaration that the first and second respondents are unfit to hold any public office and be disqualified from running and managing the Bomachoge Constituency Fund,***

(vii) ***Any order/writs and directions as the Court may deem just in the circumstances.***

Attached to the Petition is the Verifying Affidavit of the First Applicant (Petitioner) Paul Nyabere Onukoh, also having annexed thereto the consent and authority of the other Seventeen Petitioners, dated 18th January, 2007, and said to be made pursuant to the provisions of Order 1 rule 12 (v) & (2) of the Civil Procedure Rules made under the provisions of the Civil Procedure Act, Cap. 21, Laws of Kenya

In support of the Petition, the First Petitioner, Paul Nyabere Onukoh has had sworn on his own behalf and on behalf of the other 17 Petitioners an affidavit described as a Supporting Affidavit made or sworn on 18th January, 2007.

In addition to the said Supporting Affidavit the first Petitioner also swore on 6th February, 2007, an Affidavit filed on 7th January, 2007 in which he expressed fear over his life.

In answer to the Petition, one Jacob Mogaka, the Chairman of the Bomachoge Constituency Development Fund Committee, had filed on 15th March, 2007, a Replying Affidavit sworn on the same day and to which affidavit I shall refer to later in the course of this judgement.

To the said Replying Affidavit the Petitioner swore and had filed a Replying Affidavit on 23rd March, 2007 attaching thereto pictures of facilities allegedly funded by the Bomachoge Constituency Development fund, and whose costs the Petitioner avers on his own behalf and on behalf of the other Seventeen Petitioners is exaggerated; and calls upon the First and Second Respondents to account.

For the Third Respondent, the Honourable Attorney-General were filed on 30th April, 2007, Skeleton Arguments, but no Replying Affidavit.

To facilitate the quick disposal of this matter, the parties abandoned several interlocutory applications, and concentrated on the principal matter, the Petition aforesaid. The Petitioners' arguments are as set out in the Skeletal Submissions dated and filed on 20th April, 2007, and the Petitioners' Further Skeletal Submission dated and filed on 30th April, 2007.

The respective Counsel, Mr. Enonda for the Petitioners, Mr. Nyakeno for the First and Second Respondents and Mr. Njoroge for the Third Respondents relied upon their respective written submission on 30th April, 2007.

I have perused and carefully reviewed the Petition herein, the Affidavits in support thereof and the Affidavits in Reply in opposition thereto, the respective Counsel's submissions and the basic issue or complaint raised by the Petitioners is as stated in the Petitioners' further Skeletal Submissions at page 2 (following the chronology of argument as the pages are not numbered) is this – ***“the first Respondent the Hon. Joel Omagwa Onyantha has afforded a different treatment to the regions of Bomachoge Constituency in his performance of a public function under Section 23 of the DCF Act. This is further fortified by the manner he has accorded privileges to the people of his clan to the disadvantage of other groups (clans)”***

The Petitioners also claim in their submission that the facts as presented by the Petitioners have not been controverted by way of contrary evidence save for mere denials devoid of any evidence to the contrary.

So far as the latter contention is concerned in relation to the Third Respondent, the Hon. The Attorney-General, the Petition in so far as it seeks any orders against the Attorney-General has been adequately addressed as a matter of law in the submissions made by Counsel for the Attorney-General, and do not

need any Affidavit to controvert. The Attorney-General's case is this.

It is not a necessary party in these proceedings. The only issues in the entire petition concern the actions and/or omissions of the first and second Respondent. The only reference to the Attorney-General is a statement that he has a duty to ensure the protection of individual rights from being violated.

There is also no evidence on oath that any report was made to the Attorney-General about the unlawful actions of the first two Respondents, and consequently there was no duty imposed on the Attorney-General to investigate any alleged wrong-doing or Criminals activity by the First two Respondents.

Having considered these contentions, I must say that I uphold the same. The office of the Attorney-General is created by Section 26 of the Constitution. The functions or duties of the Attorney-General are set out in Section 26 (2) and (3) of the Constitution. The Attorney-General is the principal legal adviser of the Government of Kenya (Section 26 (2)).

The Attorney-General has power where he considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority, and

(c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority;

Under Section 26(4) of the Constitution, the Attorney-General is invested with power to require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion relates to any offence or alleged offence or suspected offence, and the Commissioner is bound to comply with such requirement, and after his investigations the Commissioner is bound to report to the Attorney-General on his investigations.

The common procedure in our criminal justice system is for an aggrieved party to report his grievances to the nearest police post or Station if he has information that a person or group of persons have committed or about to commit a crime. If the police fail to take action and investigate the matter, or complaint, the complainant may write to the Director of Criminal Investigation (C.I.D) and if the Director of C.I.D opts to take no action, and the complainant or informant still feels aggrieved, he may write directly to the Commissioner of Police, and if the said Commissioner of police ignores his complaint or information, the law abiding citizen may then write to the Attorney-General.

It is the constitutional obligation of the Attorney-General to consider any such complaint and if he determines that it is a complaint or information upon which further action or investigation should be undertaken he will no doubt write to the Commissioner of Police who in turn is bound to carry out the investigation and report to the Attorney-General.

In this case, there is not Single bit of information or evidence that any complaint or information was laid either at the feet of the Police, on the ground, the Director of C.I.D. the Commissioner of Police or less the Attorney-General.

There is therefore no basis in law or the constitution for prayer (iv) of the petition for a declaration that the misallocation of public resources in Bomachoge Constituency by the First and Second Respondents amounts the embezzlement of public resources which the Third Respondent (***ie. the Attorney-General***) is bound to investigate. This aspect or part of the petitioners prayers must fail, and I so order.

Having disposed of the prayer against the third Respondent, I now turn to investigate the other prayers sought in the Petition, namely, the prayer for mandamus and the other prayers (declarations) sought on

the grounds of breach of the Petitioners fundamental rights under Section 82 (1) (2) and (3) of the Constitution.

The prayer for mandamus is premised upon the Court's powers under Section 84 (2) of the Constitution to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70-83 (inclusive). These are the provisions set out in Chapter V of the Constitution, entitled "**Protection of Fundamental Rights and Freedoms of the Individual** or sometimes **referred to as the Bill of Rights**."

An order of "***mandamus***" is said to be "***a mandate***" from the High or Superior Court, to any person a subordinate Court, authority, body or body of persons to carry out a Statutory duty imposed upon such person, authority or body or body of persons which such persons or other authority has failed to carry out as required by the enabling law or legislation.

The relevant or enabling law in this case is the Constituencies Development Fund Act 2003 (No. 10 of 2003), and the Constituencies Development Fund Regulations 2004 (L. No. 34 of 2004). The Applicable provisions of the Act is Section 23 which provides-

"23(1) There shall be a Constituency Development Committee for every Constituency, which shall be constituted and convened by the elected member of Parliament within the first thirty days of a new Parliament and shall have a maximum of fifteen members, comprising of –

- (a) ***the elected member of Parliament;***
 - (b) ***two Councillors in the Constituency***
 - (c) ***one District Officer in the Constituency,***
 - (d) ***two persons representing religious organizations in the Constituency;***
 - (e) ***two men representatives from the Constituency;***
 - (f) ***two women representatives from the Constituency;***
 - (g) ***one person representing the youth from the Constituency;***
 - (h) ***one person nominated from among active NGOs in the are if any;***
- 2) ***The elected Member of Parliament for every Constituency shall, within the first year of a new Parliament and at least once every two years thereafter, convene locational meetings in the Constituency to deliberate on development matters for the location, the Constituency and the District.***
 - 3) ***Each Location shall come up with a list of priority projects to be submitted to the Constituency Development Committee;***
 - 4) ***The Constituency Development Committee shall deliberate on project proposals from all the locations in the Constituency and any other projects which the Committee considers beneficial to the Constituency, including joint efforts with other constituencies then draw up a priority projects list both immediate and long term, out of which the list of projects to be submitted to Parliament in accordance with Section 12 shall be drawn.***
 - 5) ***the elected members of Parliament for every Constituency shall be the Chairperson of the Constituency Development Committee, unless he or she opts out in which case the Committee shall elect one amongst themselves to be the Chairperson;***
 - 6) ***The quorum of the Constituency Development Committee shall be one half of the total***

membership;

For an order of **mandamus** to issue, the Petitioners needed to show that the First and Second Respondents have failed in any of its mandates – to convene locational meetings Section 23 (2)), to deliberate on projects (Section 23 (4), or that the membership of the Committee is not in accord with the requirements of Section 23 (1) as outlined above, and in which event, the prayer would not be for a **mandamus** but a **certiorari** to quash the composition of the Committee for being illegal or **ultra vires** the provisions of Section 23 (1) of the Act.

There is no evidence that the Constituency Development Committee failed to invite locational Committees which are chaired by the area chiefs to bring new proposals or that such projects have been rejected.

The driving force behind the Constituency as Development Fund (established under Section 4 (1) is the National Constituencies Development Fund Management Committee (the National Committee set up under Section 5 (1) of the DCF Act. The functions of the National Committee which are set out in Section 6 (1) of the Act are **inter alia**

- (i) to ensure the allocation and disbursements of funds to every Constituency (6) (1) (a),**
- (ii) to receive and discuss annual reports and returns from the Constituencies (Section 6 91) (c),**
- (iii) to ensure timely submission to Parliament of various returns, reports and information as required under the Act,**

Section 20 sets out the criteria for funding of projects under the Act, and Section 34 of the Act provides for auditing of funds under the Act by the Controller and Auditor-General.

The several Affidavits of the First Petitioner Paul Nyabere Onukoh do not shed any light as to failure by the First and Second Respondents, to comply with requirements of the Act as to **firstly** composition or the constitution of Development Fund Committee, **secondly** the lack of consultation with the locational committees including the Petitioners locations, or area Chiefs, **thirdly,** complained to the National Management Committee, **fourthly** lack of audit by the Controller and Auditor-General, or **fifthly,** any embezzlement of Constituency development funds.

It is both pertinent and important to remind the Petitioners that allegations of embezzlement of funds are allegations of theft, and therefore criminality. It is for the courts to make such a finding upon evidence to that effect, such as an auditor's report or finding. The court is not endowed with investigatory accounting powers on a Petition such as the present one. There is consequently no iota of evidence to show failure by the First and Second Respondents to perform their respective statutory duties under the CDF Act. An order of Mandamus does not lie, and again I so find and hold.

The gravaman of the Petitioners claim is that they or their **clans** have been discriminated against contrary to the provisions of Section 74(1), 82(1), (2) (3) & (7), and section 70(A) and 78(1), as per the heading to the Petition, but the prayer for a declaration is restricted to Section 82 91) – (3) of the Constitution, that – a declaration that the First and Second Respondents have violated the Constitutional rights of the Petitioners as guaranteed under these provisions.

In view of the apparent abandonment of prayers in relation to Sections 74 (1) and 78(1) of the Constitution, I shall only make a brief reference to those Sections.

Section 74 (1) provides that no person shall be subject to **torture** or to **inhuman or degrading punishment or other treatment**

Torture, or inhuman or degrading treatment is usually concerned with the physical/and occasionally psychological treatment of persons e.g. solitary confinement of prisoners or detainees), or actual physical

and brutal assault and battery of persons. Even with the modern elasticity of minds and language, I do not see how the exclusion of the Petitioners from the membership of the Constituency Development Committee, or the non prioritization of projects within their locations (***of which there is no evidence***) could wildly be called or termed ***inhuman*** or degrading ***punishment***. This ground without saying more, does not lie.

Section 78 (1) of the Constitution protects the right to unhindered enjoyment of freedom of conscience, freedom of thought and of religion and to change that religion, or belief, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

The Petition herein (the subject of this judgment) is a manifestation of the Petitioners freedom of conscience, above and collectively in community. One cannot say that because he is not a member of the Committee, he is thereby denied the freedom of conscience. It is stretching such concepts to realms unknown in logical thought.

Section 82 (1) – (3) inclusive provides as follows-

82 (1) subject to subsections (4) (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) subject to subsections (6) (8) and (9) , no person shall be treated in a discriminatory manner by a person by virtue of any written law, or in the performance of the functions of a public office or public authority.

(3) In this Section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

Section 82 (4) sets out situations in which the law may make provision for different treatment of persons who are not citizens of Kenya, or on matters of personal law, such as adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, and Section 82 (5) says-

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.

Section 82 (8) also provides for situations in which a law may be made for restrictions of persons referred to therein.

The essence of the Petitioners case is that the first and second Respondents have violated their constitutional rights as guaranteed under Section 82 (1) (2) and (3) of the Constitution.

For the Petitioners to succeed in their Petition they must show the manner in which the First and Second Respondents have violated, or caused their rights to have been violated, and in this instance the petitioners must also show what is vested in them under the CDF Act, and which the said respondents have breached. To show such discrimination, the Petitioners must show that they are either the only eligible Councilors in the Constituency, or District Officer(s) religious organization’s representatives, or the only youth representative or the only eligible person to be nominated from an NGO, all as stipulated by Section 23 (1) of the CDF Act, or that theirs is the only location which has been locked out of

consideration for funding.

In essence for a Constitutional application to succeed the Petitioners must show that there is a Constitutional issue for determination. On the facts and pleadings herein, there is no such constitutional issue for determination. There is also no issue of determination in relation to the constitutionality or otherwise of the CDF Act. The Petitioners are neither of a different race, tribe, place of origin or residence or other local connexion, colour or creed. They may hold different political opinions from the First Respondent, but this alone will not confer upon any one of them or they as Petitioners the description of being discriminated against.

In the milieu into which Kenyan tribes are entering it is difficult to say as the Petitioners suggest, that any one clan straddles an entire Constituency or that one such clan is homogenous in every aspect, so that the seventeen petitioners are patched in a corner, not to be reached or touched with the projects funded by the Constituency Development Fund.

In short there is absolutely no merit in this petition. It raises no constitutional issue for determination by the Court. There was no claim of wrong doing by either the National Management Committee of the Fund or the Controller and Auditor-General and joinder of the Attorney-General as Third Respondent had no basis as already stated above, and the claim for an order of *mandamus* could and does not lie. For the Petitioners the value of this petition lies in disrupting and halting the on-going activities or projects financed by the Bomachoge Constituency Development Fund. This is neither in the interests of the Petitioners as prospective political leaders nor certainly of the residents of Bomachoge Constituency.

Finally before ending this judgment, I observe that the Second respondent herein is named as the Bomachoge Constituency Development Committee.

A Constituency Development Committee is provided for in Section 23 (1) of the CDF Act. It is comprised of named persons, and holders of named or designated offices or representatives thereof. The Committee is thus composed of diverse individuals, and a maximum number of fifteen is fixed. Its status is not defined in law. It is not a body corporate. It cannot therefore sue or be sued by that name. Any suit must be brought in the name of the Chairman, and all the members, or at the very minimum, the Chairman, Secretary and Treasurer or the committee. To the extent that the Petition was brought against the Bomachoge Constituency Development, the same was also incompetent. For all those reasons, the Petition dated 18th January, 2007, and filed on 19th January, 2008 is hereby dismissed with costs to the first and third Respondents to be taxed and certified by the taxing officer if not agreed upon by the party's Counsel. Preservatory Orders are hereby vacated.

There shall be orders accordingly.

Dated and delivered at Nairobi this 2nd day of October 2007.

M.J. ANYARA EMUKULE

JUDGE