**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**Misc Application 352 of 2004**

**JOHN ONYANGO OYOO……..1ST APPLICANT**

**JACK ODHIAMBO AORO…….....2ND APPLIACANT**

**CLLR. JOSEPHINE ABONYO……..3RD APPLICANT**

**CLLR. SHADRACK OTIENO……...4TH APPLICANT**

**CLLR. LEONARD OBURU SUKA……...5TH APPLICANT**

**CLLR. MARTIN AKOKO CHERA……..6TH APPLICANT**

**VERSUS**

**ZADOCK SYONGO……...1ST RESPONDENT**

**DISTRICT ACCOUNTANT SUBA DISTRICT…….2ND RESPONDENT**

**ZACHARIA AWUONDA OGUMA (CHAIRMAN,-**

**SUBA DISTRICT PROJECT COMMITTEE…….3RD RESPONDENT**

**RULING**

This application is novel in its intents and purposes but highly opprobrious and noxious against the interest of the sitting member of parliament of Gwasi. It is the pontification of the views of the constituents of Gwasi, in the way their area M. P. manages, handles and controls their constituency development fund. To me it is the beginning of what would become pertinacious litigation in the implementation of the provision as contained in the constituency development fund Act No. 10 of 2003. The Act is dear to both the area member of parliament and residents of the constituents for the effects and benefits would be felt at the rural areas.The contents was promulgated by the sitting member of parliament's then their mandate is exclusive and absolute may be shut out potential aspirants and to use the resources as a bait. It is an Act that perpetuates the sitting member of parliament's 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. The dispute before me is centered on a decision to inequitable distribution of he funds allocated to Gwasi constituency in a manner likely prejudicial to the interest of the area residents.

The application for my determination is the notice of motion dated 23rd December 2004, under Order 53 rule 3 of he civil procedure rules seeking orders

1. that an order of certiorari do issue to move into this court and quash all the decision, actions pronouncement and measures of the respondents so far made in respect of implementation of the Constituency Development Fund Act 2004

2. That an order of prohibition do issue restraining the respondent by himself agents servants or otherwise howsoever from making any other or further decisions, actions pronouncement and measures aimed at implementing the constituency Development Fund Act 2003.

3. That an order of mandamus do issue directing the respondents to disburse the funds of Constituency Development Fund Act 2003.

The applicants are alleging that the first respondent has constituted the Gwasi Constituency Development Committee in accordance with section 23(1) of the Act but they are challenging as to how and when the said committee was constituted. The other point which is the basis of the dispute is the approved list of projects for the year 2003/2004 in relation to Gwasi Constituency.

Mr. Ocharo Advocate for the applicants submitted that the respondents to the application are sued in respect of the Administration and Management of the Constituency Development Fund and the applicants are members of Gwasi Constituency who have substantial interest in the disbursement as constituents and as leaders of that constituency. He contented that the first respondent being entrusted with prudent management or providing leadership in the distribution of the funds but incomplete disregard of the provisions of the Act left out several locations in Gwasi in inequitable and unlawful distributions of the funds under the Act.He submitted that the projects for funds have been stated by the respondents as J002 which is the offensive decision against which the intervention of the court has been sought. Mr. Ocharo Advocate further submitted that the applicants have the capacity to challenge the actions of the first respondent and they have supplied sufficient evidence to guide the court to quash the decision which fails to comply with the provisions of the law. There is real and inequitable distribution of the funds voted by the parliament.

Mr. Ocharo Advocate for the respondent took up a preliminary objection that the applicants have no capacity to institute and prosecute the present proceedings. The applicants are saying that they are members of Gwasi Constituency and therefore they have come in their individual capacity hence they have no legal capacity to institute the present proceedings. Mr. Ochieng Advocate submitted that the prayers sought by the applicants are contradictory and incapable of being granted or enforced. He contented that the orders sought are not in the alternative but be granted together. In essence the applicants are saying the respondents be stopped and at the same time be directed t comply with the Act therefore be urged me to dismiss the application.

I have on my part noted that the constituency Development fund is created by an Act of parliament, which comes under the National Constituency development fund. The primary functions of the National committee is interalia

1. to ensure allocation and disbursement of funds to every constituency.

2. to ensure prudent management of he funds.

It is also the mandate of he national committee to set out general conditions and requirements for release of funds.And funds allocated to a particular project shall remain allocated and shall not be re-allocated during the financial year for any other purposes. It is essential to note the national committee relies on the list of purposed projects submitted b the sitting members of parliament. It is not clear in the Act as to the avenues opened to persons or location or divisional leaders who are aggrieved by the list of projects submitted by a particular member of parliament. The intention of this legislation is remarkably excellent in that the projects available for funding must be community based so that prospective benefits are available to a widespread cross-section of the inhabitants of the particular constituency.The contents of the Act is geared towards initiating development projects in order to help area residents (constituents) improve and develop their livelihood. However the Act depicts the intention of the current sitting M.P’S

in that the opening of a constituency office is considered as a development project and even the furniture and equipment for the office is among the development project which get priority in finding. It is not clear as to the kind of furniture and equipment which can be used, especially when there is a conflict between several projects submitted for funding. I am saying so because there is no mechanism or measure to safeguard the wider interest of the people living on a particular constituency against the discretion of the sitting M.P. to priorities projects and submit them for funding. Section 23(1) of the constituencies Development Fund Act number 10 of 2003 states.

> "**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 (30) days of a new parliament and shall have a maximum of fifteen members".**

It is clear in my mind that the intention of section23(1) was for the sitting MPs to have full and firm control of the composition of the committee for him to have complete and unequivocal control of the use of the funds to the best of his interests as he deems fit, in conjunction with the other committee members he has appointed or selected. Section 23 of the Act gives the sitting MP an absolute discretion to create or elect, select op appoint a committee, which are friendly to his good intentions so that he has exclusive control in the Administration and Management of the fund allocated to a particular constituency. RThe applicants in my understanding are not saying that the area member of parliament has selected or appointed certain persons who are not supposed to be members and there is no material before me to suggest that the committee as currently constituted contravenes the provisions of the Act. In performances of his duty under section 23 of the Act the area member of parliament is required to act fairly and to the best interest of all the residents of the constituency.It is my position that there is no clear mechanism in the Act to control abuse or excessive use of authority by the sitting member of parliament under the powers given to him under section23 of he Act. It is my view such unfettered discretion accorded to the sitting member of parliament without checks and balances can create grave injustices, which cannot be corrected unless he/she is voted out of parliament, it is here that the court's supervisory jurisdiction would have to be invoked properly to entertain and alleviate a citizen's grievances as to the exercise of discretion by the sitting member of parliament, which brings me to the issue of capacity of the applicants in bringing the present application.

It must be noted that an important restriction on the grant of remedies of judicial review is that the persons seeking must have or demonstrate sufficient interest. And since remedies must translator correspond with rights the party must be directly affected by the decision. The party seeking the remedies must show that his/she has the requisite standing or status or interest to qualify for, an award of he remedy sought I am satisfied that the applicants have a duty to participate in the development of their respective areas and to safeguard the interest of the places where the area member of parliament considers as less relevant, may be because of politication consideration and other inclination. And since the intention of parliament was to ensure benefits are available to a widespread cross-section of the inhabitants of a particular constituency and above all the projects are community based, then the court would entertain a citizen's grievances as to the exercise of discretion in respect a right infringed by persons given authority to implement the Act.In so far I can understand the intention of the applicant's application is geared towards an equitable and fair distribution of the funds allocated to Gwasi Constituency with due regard to the importance and priority of the projects to be implemented. The prominent role of the applicants are that of voters and secondly as residents interested in the use and allocation of funds to projects which are community and priority based. It is my opinion that every voter in Gwasi constituency has a right to question an illegality based on an inequitable distribution, control and management of their fund n conjunction with their area member of parliament therefore the issue of capacity cannot be used to defeat the present applicant's plea to indicate their rights if the person entrusted (MP) to safeguard fairness cannot grantee equitable distribution of the resources available to the residents and voters of Gwasi constituency. The Act should have set out clear mechanism and control in respect of unlawful conduct or persons exceeding their powers. However, it is my considered opinion that the Act creates lacuna as to the procedure to be adopted by an individual aggrieved by the decision reached by the committee appointed under section 23 (1) of the Act.

The applicants may be immensely aggrieved or consider the decision of the respondent as unreasonable

but its important to define and state the decision which the subject of the complaint and when it was made. The respondent may not have complied with the provisions of section 23(2) CDF Act but it is important for me to know when and the actual date, so that the orders of judicial review as applicable or amenable. Mr. Ocharo Advocate for applicants submitted that the projects for funding had been sated by the respondent as JOO2 and he submitted that JOO2 is the offensive decision against which the intervention of the court has been sought.He further contended that the applicants seek an order of certiorari to quash the decision, action and measures in regard to the implementation of the constituency development fund Act. According to the press release by the National Management committee on Constituency Development Fund – disbursements of funds for the year 2003/2004 of 30th August 2004, Gwasi constituency is listed under the constituencies that have satisfied all requirements of CDF A ct, which means the projects submitted by Gwasi constituency was deliberated upon by the National Committee which is the highest organ in the implementation of the constituency development fund as mandated by the Act, and the National Committee was satisfied and approved all the projects submitted by Gwasi.

In my understanding the projects submitted by Gwasi constituency is per JOO2 and the said proposal submission is what Mr. Ocharo Advocate calls **the offensive decision.** I have perused the offensive document, which is the basis of the present application, and I have noted that it is dated 4th June 2004. It is not in dispute that the present application for leave was filed in court on 16th December 2004, which brings me to the issue whether the jurisdiction of the court was properly involved by the applicants. According to order 53 rule 2.

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, degree, conviction or other proceedings for the purposes of its being quashed unless the application for leave is made not later than six (6) months after the date of the proceeding."**

The first prayer in this application is certiorari and unless the proceedings is brought within the mandatory six (6) months period, then certiorari is not efficacious and the other two (2) prayers would too fail. It is outside the mandate of the court to give orders when the jurisdiction of the court to entertain the matter has not been properly invoked.As rightly pointed by Mr. Ochieng Advocate for the respondents, the prayers sought by the applicants are contradictory in nature and it would be a nullity for me to consider the of such orders which would be in conflicts. It is my view that unless the application for leave to apply for judicial review is made within the mandatory six (6) months or earlier then it would be incompetent to sustain it. The offensive decision was made on 4th June 2004, and the present application for leave was filed on 16th December 2004, therefore it is outside the required period of six (6) months. The application for my determination or consideration is not available to the applicants; hence in my understanding the whole application is bad in law and an abuse of the powers of judicial review.

As a matter pf concern I must acknowledge the gravity of the matter and the public expectation that the court must protect the interest of the public against excesses by persons acting on authority, However I am bound to follow the law. The court is constrained to apply the law to the issues before it and since my powers was not properly invoked I cannot excuse or sanction a fundamental breach, hence it remains the responsibility of parties to ensure the issues for determination are properly before court.

On the other hand, I have noted the Act is replete with grave deficiencies though I must confess the intention was to empower Wanjiku's and make available priority and urgent needed developments to areas which might be considered by the Executive as less relevant may be because of political expediency or distorted attitude. Having solved that deficiency, the Act created another monster by giving parliamentarian executive powers, in the name of implementing the ACT. The Act gives sweeping powers to the area member of parliaments to appoint the persons who would serve in the CDF committees, which means it is a legislation which is friendly or advantageous to the current member of parliament in order to shut out perceived or real rivals in the control, use and management of the funds allocated to a particular constituency. As a result the CDF can be wrongly demonized as a way to solidify and perpetuate the wishes and good intention of the sitting member of parliament without according an opportunity to potential opponents or persons likely to be affected by the decisions of the member of

parliament.The Act gives the sitting member of parliament unlimited and unchecked executive powers in the implementation of the CDF Act and the temptation by parliament to examine and scrutinize the records in respect of the funds may be a duplication and contrary to the principles of natural justice that no person shall be a judge in his own case or cause.

Lastly, the Act in my humble opinion does not create or defined the capacity of the creature it has created. It is not clear who is legal entity to be sued, may be the national committee or what. It is outside my powers to question the legal creature of the Act since it was not one of the issue for my determination. However if called upon at the opportune time, I would weigh the relevant submission and make an appropriate decision. In the premises the application fails the test applied and is dismissed with no orders as to costs.

**Dated and Delivered at Kisumu this 11TH day of April 2005**

**M. WARSAME**

**JUDGE**

11.04.2005

Coram warsame – Judge

Mr. Ocharo for the applicant

No appearance for the respondent

Court clerk Collins

Ruling read in open court.

**M. WARSAME**

**JUDGE**

Mr. Ocharo: may we have a copy of the ruling.

**COURT:**

Copy of the ruling to be supplied.

**M. WARSAME**

**JUDGE**