



Motorongo & 4 others v National Government Constituencies Development Fund Board & 2 others; National Gender and Equality Commission (Interested Party) (Petition E002 of 2022) [2024] KEHC 5369 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 5369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PETITION E002 OF 2022
REA OUGO & REA OUGO, JJ
MARCH 14, 2024
IN THE MATTER OF: ARTICLE 22 (1) OF THE CONSTITUTION OF
KENYA
IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 3 (1),
4 (2), 10 (2) (A, B & C), 12 (1) (A), 19 (1 & 2), 21 (1&3), 24, 27
(1) (2) (6) (7), 35, 56, 201 (B) (III) AND 259 (1), 260 OF THE
CONSTITUTION OF KENYA, 2010
IN THE MATTER OF: THE NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND ACT, NO. 30 OF 2015
IN THE MATTER OF: THE OGIEK/NDOROBO COMMUNITY IN MT.
ELGON CONSTITUENCY**

BETWEEN

**DAVID MOTORONGO 1ST PETITIONER
ESTHER SANUTIA 2ND PETITIONER
STANLEY KITONEE NDIEMA 3RD PETITIONER
COSMAS MURUNGA 4TH PETITIONER
MELICAH CHEMUTAI KIPSUKE 5TH PETITIONER**

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD 1ST RESPONDENT**



**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
COMMITTEE MT ELGON 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

AND

NATIONAL GENDER AND EQUALITY COMMISSION .. INTERESTED PARTY

JUDGMENT

1. The petitioners being residents and members of the Ogiek/Ndorobo Community raised a complaint before the 2nd respondent over skewed allocation of National Government Constituencies Development Fund (NGCDF) against their community. They explain that the Ogiek/Ndorobo community constitutes a small population in Kenya of approximately 20,000 people. The majority of the Ogiek/Ndorobo community live in Chepyuk ward, Chepkitale ward and Kaboywo in Kaptama ward in Mt. Elgon Constituency. Two thousand five hundred of them live in Trans Nzoia County.
2. They contend that in Chepkitale location, in Kaptama ward which is within Mt. Elgon constituency, all the schools have never received any funds from Mt. Elgon NCDF since the fund came into operation. Kabwoyo village has 2 schools and Chepyuk location have 15 schools.
3. The petitioners therefore sought to be supplied with information relating to all NGCDC-supported projects between 2017 – 2020, a copy of the bursary list for the said period and plans/projects that the 2nd respondent had in place for the primary and secondary schools within the Ogiek community. They also requested a public meeting where they would share their concerns on the issues.
4. They received a response from the 2nd respondent vide its letter dated 13/8/2019 where it denied the petitioners and members of their community an opportunity to share their views and it further denied them the information they had sought. The petitioners were also not provided with the information sought.
5. When the efforts of the petitioners to resolve their issues with the 2nd respondent hit a snag, they wrote to the 1st respondent seeking their intervention, specifically requesting that it convenes an Arbitration Panel in line with section 56 of the NGCDF Act. However, the 1st respondent was of the view that the issues raised by the petitioners had been adequately addressed by the 2nd respondent. The petitioners therefore engaged the Commission on Administrative Justice (CAJ) which directed the 1st respondent to provide information to the petitioner. However, the 1st respondent has yet to release to the petitioner all the information it requested. The petitioners have advanced that the actions of the respondents violated affirmative action, equality, equity, reasonable accommodation and protection of the marginalised principles as espoused by the Constitution.
6. The petitioner therefore filed this instant suit before the court seeking the following reliefs:
 - a. A declaration be and is hereby issued that the respondents have violated the petitioners' right to access information that was crucial in the exercise and protection of their collective rights of the Ogiek/Ndorobo community living in Mt. Elgon Constituency by denying to supply information relating to NGCDF funded projects in the 2017-2020 term.
 - b. A declaration be and is hereby issued that the 2nd respondent's failure to convene a public forum of the Ogiek/Ndorobo community since 2019 despite numerous requests violates



Article 10 (2) (a) of the Constitution and sections 3, 24 and 27 of the National Government Constituencies Development Fund Act, No. 30 of 2015.

- c. A declaration be and is hereby issued that the 2nd respondent's deliberate failure to grant bursaries to primary and secondary schools in arrears inhabited by members of the Ogiek/Ndorobo community violates their children's right to basic education as guaranteed by Article 53 of the Constitution.
 - d. A declaration be and is hereby issued that the 2nd respondent deliberate failure to grant development funds and bursaries to primary and secondary schools violates the principles of participation of the people, social justice, inclusiveness, non-discrimination and protection of the marginalised, transparency and accountability as set out in Article 10, 21 (1), 27, 56 and 201 (b) (iii) of the Constitution.
 - e. An order of disclosure compelling the 2nd respondent to disclose all NGCDF funded projects by category for the financial years 2017/18, 2018/19, 2019/20, 2020/21, 2021/22 in Cheptais, Chepyuk, Chesikak, Elgon, Kapkateny and Kaptama wards in Mt. Elgon Consistency.
 - f. An order compelling the 2nd respondent to hold at least one public forum with members of the Ogiek/Ndorobo community in order to receive their grievances in the manner of application and prioritization of NGCDF projects and prioritization of projects targeting the Ogiek/Ndorobo community in the new term 2022-2027 and file a report with the court every twelve (12) months for the entire term.
7. The petition was filed together with the supporting affidavit of David Motorongo reiterating the contents of the petition.
 8. The petition was opposed by the respondents. The 1st respondent filed its replying affidavit dated 8th July 2022 through its company secretary, Simon Ndekwa. It was deposed that section 3 (d) of the Act sets out the principle of public participation in the management of the NGCDF Fund ('the fund'). The procedure for public participation is provided for under sections 27 to 31 of the Act. Although the petitioners have complained about being denied an opportunity to share their views, they have not availed any evidence showing that they were blocked from participating in any of the open forums under section 27 (1) of the Act. They have similarly failed to show that they presented their views in the said forums but the same were ignored either by the constituency committee or even the board. It was also advanced that the board provided the petitioners with information as per its letter dated 02/09/2021.
 9. It was explained that section 3 (b) of the Act recognizes the constituency, as opposed to ethnic communities, as the platform for identification, performance and implementation of national government functions. The fund does not support any particular community, but rather the inhabitants of a particular constituency without discrimination along ethnic lines. It would therefore be inappropriate to seek the rights of a particular ethnic community guised in the form of the present petition.
 10. The 1st respondent maintains that the petitioner's allegations are inaccurate. They contend that schools listed in the petition have received funds over the years as per Exhibit SN-1. On the issue of bursaries, the 1st respondent contends that they are issued based on the cases of needy students as opposed to ethnic lines. In any event, the petitioner failed to demonstrate that any needy applicants were denied bursaries.
 11. It was further averred that when considering projects for funding, the board will usually scrutinize them for compliance along the parameters set out under section 24 of the Act namely: whether they



were in respect of works and services falling within the functions of the national government under the Constitution; and whether they are community-based. The funds are allocated on a propriety basis and ethnic composition is not one of the considerations under the Act. The petitioner's demand for preferential treatment, if entertained, would amount to discrimination against all other constituents not belonging to the Ogiek/Ndorobo ethnic group.

12. The 1st respondent further raised a preliminary objection on the following grounds:
 1. That the alleged complaints and disputes herein having arisen due to the administration of the National Government Constituencies Development Fund Act, No. 30 of 2015 and/or from the Petitioner's dissatisfaction with, the 1st respondent's response or resolution to the dispute, the Petitioners were under statutory obligations under section 56 (4) at the first instance, to declare a dispute and trigger appointment of an arbitral panel.
 2. That in the event of failure to agree on the arbitral panel, the petitioners would have been at liberty to apply to the Cabinet Secretary to reconsider the 1st respondent's decision and determine the matter.
 3. That consequently, the petitioners have sidestepped the statutory mechanisms for the resolution of disputes under the National Government Constituencies Development Fund Act, 2015 with the result that the Honourable Court's jurisdiction to entertain the petition is yet to crystalize.
 4. That consequent to paragraphs 1, 2 and 3 above, the Petition is bad in law for breach of the doctrine of exhaustion.
13. The petition was further opposed by the 2nd respondent through its replying affidavit deposed by Carolyne Wanyonyi, the Fund Account Manager. It was averred that the Mt. Elgon National Government Constituency Development Fund Committee is guided by a strategic plan for specific projects to be implemented. The strategic plan 2019-2023 was prepared with wide consultation and public participation whereby the views of all members of various wards were taken into account. The committee convened open public forum meetings in every ward to deliberate on development matters in the ward and the constituency. After deliberations on project proposals from all the wards in the constituency, it then came up with various projects to be implemented for the various financial years. The petitioners were not denied an opportunity to share their views during the public forum meetings and the committee complied with the principles of public participation set out in section 3 (d) of the Act. There was a fair distribution of national government resources by the committee. The committee does not serve a particular ethnic group but is obligated to serve all the people within a particular ward. The committee issues bursaries to needy cases as opposed to ethnic lines. The petitioners have failed to demonstrate that there were needy applicants who applied and were denied bursaries.
14. The 2nd respondent also denied that the petitioners' rights to information were violated as there was no evidence that they sought information and were denied.
15. It was further advanced that it is now settled that any party claiming violation of constitutional rights has a burden placed on him to cite with reasonable precision of the constitution the rights that have been violated and how they have been violated.
16. The petitioners also failed to comply with the elaborate dispute resolution mechanism provided under sections 56 (1), (3) and (4) of the National Government Constituency Development Fund No. 30 of 2015.



SUBMISSIONS BY THE PARTIES

PETITIONERS' SUBMISSIONS

17. The petitioners on the matter of jurisdiction submit that the matter is properly before the court. Firstly, the 1st and 2nd respondents have deliberately frustrated the petitioners for more than 5 years in dealing with the complaints raised by the Ogiek/Ndorobo community. Secondly, the petitioners have tried their best to invoke the alternative dispute resolution provided under the section and their issues are treated with contempt by the 1st respondent. Thirdly, despite framing their issues in the letter dated 5th November 2019, the 1st respondent kept taking the petitioners in circles and was still asking them to frame issues for the Board's consideration in their final letter dated 18/01/2022. Fourthly, the 1st and 2nd respondents have purported to determine issues raised by the petitioners casually and without a hearing or constitution of an Arbitration Panel as envisaged under section 56 (1) of the NGCDF Act, 2015. Fifthly, section 56 (4) of the Act is not coached on mandatory terms and an aggrieved party is at liberty to invoke it or move to court. Lastly, the issues raised touch on the interpretation of the group's fundamental rights and freedoms of the petitioners and the Ogiek/Ndorobo community under the Constitution which the High Court has jurisdiction over. They relied on the case of Anthony Miano & others v Attorney General & Others [2021] eKLR where the court made the following observations on the exception to the doctrine of exhaustion:

“ 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of a particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting the Court's jurisdiction must be construed restrictively.”

18. The petitioners argue that this court has the jurisdiction to hear and determine this petition and urge the court to find that the petitioners have invoked the alternative dispute resolution mechanism provided in section 56 of the NGCDF Act and were deliberately denied audience by the 1st respondent. The first respondent failed to constitute an arbitration panel in terms of section 56 (1) of the Act.

19. The petitioners submit that the petition raises the following issues for the court's consideration:

- a. Whether the 1st and 2nd respondents violated the petitioners' right to access information which was crucial in the exercise and protection of their collective rights of the Ogiek/Ndorobo community living in Mt. Elgon Constituency?
- b. Whether the 2nd respondent has deliberately failed to grant bursaries and undertake NGCDF projects in primary and secondary schools in areas inhabited by members of the Ogiek/Ndorobo community and whether this violated their children's rights to basic education as guaranteed in Article 53 of the Constitution?



- c. Whether the 1st and the 2nd respondents should be compelled to disclose information they are yet to supply petitioners relating to NGCDF-funded projects for financial years 2017/18, 2018/19, 2019/20, 2020/21 and 2021/22 in Cheptais, Chepyuk, Chesikak, Elgon, Kapkateny and Kaptama wards in Mt. Elgon Constituency?
- d. Whether the 2nd respondent's deliberate failure to convene a public meeting of the members of the Ogiek/Ndorobo community despite numerous requests violates Articles 10 (2) (a) of the Constitution and sections 3, 24 and 27 of the NGCDF Act and whether they should be compelled to hold such meeting(s) in the 2022-2027 term to receive the community's specific grievances on application and prioritization of NGCDF projects and file a report with the court every twelve (12) months?

a. Whether the 1st and 2nd Respondents violated the Petitioners' right to access information which was crucial in the exercise and protection of their collective rights of the Ogiek/Ndorobo community living in Mt. Elgon Constituency?

20. It was submitted that the Petitioners have been engaged in a sort of a battle with the 1st and 2nd Respondents since 5th August 2019 after it sought information from the respondents which they deliberately denied them access. Following an intervention by CAJ vide their letter dated 22nd July 2021, the 1st respondent provided some information yet they are not the primary custodians of the requested information. The 1st Respondent was supposed to adjudicate on issues raised by the petitioners including compelling the 2nd Respondent to provide the requested information but it appears it assumed itself as the 2nd Respondent and began defending both itself and the 2nd Respondent. The 1st Respondent did not appreciate that it had the power under sections 16 (e) and 56 (1) of the NGCDF Act to hear and determine the Petitioner's complaint including by compelling the 2nd Respondent to supply the requested information. In *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR and asked the court to consider paragraphs 34 to 40 on Article 35.

b. Whether the 2nd Respondent has deliberately failed to grant bursaries and or undertake NGCDF projects in primary and secondary schools in areas inhabited by members of the Ogiek/Ndorobo Community and whether this violates their children's right to basic education as guaranteed in Article 53 of the Constitution?

21. According to letter to of the Petitioners dated 11th January 2022 at page 13 of DM-2, it notes that no information was released regarding 2020/21 and 2021/22 financial years. The letter further notes that from the information availed, skewed and disproportionate allocations without reasonable explanation was evident and that their allegations of discrimination of the Ogiek/Ndorobo were not mere conjecture. For instance, schools in areas inhabited by Ogiek/Ndorobo received minimal allocations compared to other areas. The Petitioners point out Bukonoi Primary which is an immediate neighbor of the sitting Member of Parliament school which received a whooping Kshs. 16 Million, more than all schools in areas occupied by the Ogiek/Ndorobo Community.
22. The petitioner submit that they have perused the bulky annexures annexed to the Replying Affidavit of the 2nd Respondent which attaches;
 - a. 2019-2023 Mt. Elgon Constituency Strategic Plan marked MEC-1 and appearing at pages 7-21.
 - b. 2018 Ward Reports marked MEC-2 and appearing at pages 23-39.
 - c. 2021 Ward Reports marked MEC-3 and appearing at pages 41-55.



- d. A table marked MEC-4 and appearing at pages 57-70 showing alleged allocations per ward from 2017-2022.
 - e. Photocopies of Cheques for bursaries to various schools marked MEC-5 and appearing at pages 72-162.
 - f. List of beneficiaries for Bursaries marked MEC-6 and appearing at pages 164-436
23. In the 2018 Ward Report, Chepyuk Ward is captured in 2 pages only (32-33). It states the forums were held at Kipsigon Centre, Makutano Centre and Chepyuk Centre. Despite being 3 meetings venues, the brief comments by the Chief, DEO and Fund Account Manager (FAM) are as though only one meeting was held. Report on Kaptama Ward is captured at pages 36-38 and indicates that the meetings were held at Kaptama, Kongit and Chemoge markets none of which is near the villages inhabited by Ogiek/Ndorobo.
24. It cannot be ascertained if these alleged meetings happened or who attended them if at all they were convened. No minutes, notice calling for the meetings, which date they occurred, the venues or list of attendees attached to confirm their sufficiency. As to the alleged list of projects identified, it is not clear if these were by the participants since their submissions are not captured.
25. They submit that the 2nd Respondent did not satisfy the requirement for public participation as envisaged in section 27 of the NGCDF Act in identifying priority projects per ward, specifically in wards inhabited by members of the Ogiek/Ndorobo community.
26. Regarding the summary of projects marked MEC-4 (see pages 56-70) and copies of cheques and list of beneficiaries for various wards, having refused to supply the very information since the Petitioners started asking for it in 2019 until the filing of this particular case, the 2nd Respondent cannot purport to rely on the same information to exonerate themselves from the allegations of skewed application of NGCDF funds in Mt. Elgon Constituency. If they had nothing to hide from the beginning, they would have supplied the Petitioners the very information they have produced before this Honourable Court for their perusal to confirm or discount the serious allegations levelled against them.
27. They question the authenticity of the so-called 'summary of projects' which is just a table drawn by Carolyne Wanyonyi and not in any way evidence that those projects have been undertaken on the ground, let alone whether they are fairly distributed taking into account the concerns of the Petitioners and the Ogiek/Ndorobo community. Similarly, from the list of beneficiaries for bursary, it is impossible to ascertain if children of the Ogiek/Ndorobo also benefited and to what extent.
28. They further relied on the Court of Appeal decision in *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others* [2012] eKLR where the crux of the decision was that it would amount to discrimination of minority and marginalized communities if they were to be treated equally with the rest of the dominant communities without special affirmative action measures. The Commission on Revenue Allocation in their Second Policy and Criteria for Sharing Revenue among Marginalised Areas available on <https://cra.go.ke/download/cra-second-policy-for-identifying-marginalised-areas-and-sharing-of-the-equalization-fund/> at pages 32 and 33 thereof identifies Kaimugul and Chepyuk in Chepyuk Ward and Mt. Elgon Forest in Kaptama Ward as marginalised areas requiring deliberately targeting (affirmative action) of minorities within those marginalised areas in revenue sharing.
- c. Whether the 1st and 2nd Respondents should be compelled to disclose information they are yet to supply the Petitioners relating to NGCDF funded projects for financial years**



2017/18, 2018/19, 2019/20, 2020/21 and 2021/2022 in Cheptais, Chepyuk, Chesikak, Elgon, Kapkateny and Kaptama wards in Mt. Elgon Constituency?

29. The Petitioners need not show or demonstrate any particular interest or reason why they require the information to access the same. It is their fundamental constitutional right and the Respondents have an obligation decreed by the constitution to supply the same in the spirit of accountability, responsiveness and openness (see the Katiba Institute case (supra)). As a result of the Respondent's deliberate failure to supply the Petitioners with information since 2019, they invite this Honourable Court to find that any interventions that would have been taken in the last term of parliament in terms application of NGCDF funds towards the Ogiek/Ndorobo community had the Respondents acted within the law was a missed opportunity and consider the same in directing that there be priority in considering the community in the 2022-2027 term.

d. Whether the 2nd Respondent's deliberate failure to convene a public meeting of the members of the Ogiek/Ndorobo Community despite numerous requests violates Articles 10(2) (a) of the Constitution and Sections 3, 24, and 27 of the NGCDF Act and whether they should be compelled to hold such meeting(s) in the 2022-2027 term to receive the communities specific grievances on application and prioritization of NGCDF projects and file a report with the court every twelve (12) months?

30. The 2nd Respondent has alleged that a meeting for all was held at Chepyuk Secondary School (DM-2) and another one was not going to be held. No evidence was provided that indeed such a meeting happened, who attended and whether there was any notice calling for the said meeting. In any event, such a meeting, even if at all it happened cannot be a bar to holding a special meeting requested by the Petitioners and members of the Ogiek/Ndorobo community to address the unique concerns they raised in good faith. No valid reasons were advanced as to why the requested meeting could not be held.
31. Section 27 (1) of the Act provides that the Chairperson of the Constituency Committee (in this case the 2nd Respondent) '...within the first year of the commencement of a new Parliament (2017-18) and at least once every two years thereafter, convene open forum public meetings in every ward in the constituency to deliberate on development matters in the ward and constituency'. This provision does not limit the 2nd Respondent on the number of meetings that must be held and with which groups and how such meetings should be structured provided public participation is sufficient and that they reach the widest possible section of the public having regard to all interests.
32. Lastly, regarding filing of a report in court every twelve (12) months is relief in the nature of structural interdict to ensure the court supervises compliance given the challenges and suffering the petitioners have endured for many years pursuing their rights. Structural interdicts as an appropriate order are discussed at length in the decision of the Court of Appeal (GITHINJI, KARANJA & OTIENO-ODEK, JJ. A) in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR (see paragraphs 101-112 on comparative jurisprudence on post-judgment supervisions from South Africa, India and Canada).

1ST RESPONDENT'S SUBMISSIONS

33. The 1st respondent in their submissions identified the following issues for the court's determination:
- i. Whether the Honourable Courts jurisdiction, at the first instance to entertain the Petition under the doctrine of exhaustion.
 - ii. Whether the principle of public participation has been violated in relation to the Petitioners.



- iii. Whether the Petitioners' right to information has been infringed.
 - iv. Whether the Petitioners' children's right to basic education has been violated.
 - v. Whether the Petitioners' collective rights to fair distribution of national government resources through the NG-CDF has been violated.
 - vi. Whether the 2nd Respondent has violated the principles of social justice, inclusiveness, non-discrimination and protection of the marginalized, transparency and accountability.
34. The first issue relates to the Preliminary objection. The principal issue for determination in the Preliminary Objection the question whether the Petitioners have sidestepped the statutory mechanisms for the determination of disputes, and if so, whether that omission affects the Court's jurisdiction. In Civil Appeal No. 656 of 2022 – National Social Security Fund vs. Kenya Tea Growers Association & 14 Others, the Court of Appeal identified the following three ingredients which must co-exist to infuse jurisdiction in a Court:

“Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when:

- a. it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another;
- b. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and,
- c. the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. [Emphasis added].

The above three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.”

35. Section 56 of the National Government Constituencies Development Fund Act establishes an elaborate statutory mechanism for the resolution of disputes arising under the Act.
36. In the present case, the gist of the Petitioners' complaint is that they wrote to the 1st Respondent requesting for the constitution of an arbitral panel and that in response thereto, the 1st Respondent took the position that all the issues raised had been addressed. This is the point at which subsection 4 of section 56 kicks in, namely, where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board's decision and determine the matter. Once the Petitioners were dissatisfied with the Board's response, they ought to have applied to the Cabinet Secretary to reconsider the Board's decision and determine the matter. It is only after the exhaustion of this mechanism that the Petitioners would have been at liberty to resort to Court. (See *Wilson Wachira Ngunjiri & Another vs. Ol'joro'orok Constituency Development Fund Committee & 3 Others* [2014] eKLR).



ii. Whether the principle of public participation has been violated in relation to the Petitioners.

37. Public participation is one of the national values and principles of governance identified under Article 10 of the Constitution of Kenya, 2010. Where there is a prescribed legal framework for public participation, that framework ought to be followed. Section 27 clearly prescribes the procedure (Chairperson of the Committee to convene open forum public meeting, in every ward and in the constituency and within the first year of the commencement of a new Parliament and at least once every two years.
38. Section 27 of the NG-CDF Act adequately prescribes a legal framework for public participation, however, the Petitioners are not seeking to challenge the constitutionality of that section. The 2nd Respondent has averred that such meetings have been held regularly including in Chebyuk and Kaptama Wards. Various correspondence and reports from the 2nd Respondent as well as evidence of projects and schools that have been funded in areas the Ogiek community lives confirms that indeed such meetings have been held including with Ogiek community.

iii. Whether the Petitioners' right to information has been infringed

39. The 1st Respondent acknowledges that the Petitioners right to access information from the State organs and other public entities is guaranteed under Article 35 (1) (a) of the Constitution and section 4 of the Access to Information Act No 31 of 2016. Section 8 (1) of the Access to Information Act requires a person seeking information to "...provide details and sufficient particulars" for the public officer or any other official to understand what information is being requested.
40. It was the 1st respondent's that the Petitioners request for information was a moving target that shifted depending on the response that the Petitioners perceived to be unsatisfactory. For example, following intervention by CAJ 1st Respondent provided information relating to code lists, ward reports and bursaries reports for the financial years 2017/2018, 2018/2019 but the Petitioners alleged that the 1st Respondent omitted information relating to financial years 2020/21 and 2021/2022. (See paragraphs 54 and 55 of the Petition and paragraphs 20, 21, and 22 of the Supporting Affidavit of David Motorongo). This is incorrect as the letter of the CAJ to the 1st Respondent exhibited at page 18 of the petitioners' bundle marked as DM 2 refers only to information for the financial years 2017/2018, 2018/2019 and 2019/2020. Any other information beyond the specified period was outside the scope of the request of information and a fresh request would have to be made in respect of that information.
41. Furthermore, the Petitioners falsely alleged that schools within Kaptama and Chebyuk wards where the Ogiek live did not benefit from allocations for project funding and bursaries. (See paragraphs 32 – 37 of the 1st Respondents Replying Affidavit).
42. It is on this basis that the Respondent would request for further particulars from the Petitioners that would enable it to facilitate access to information sought. However, the information sought by the petition is exempted under section 6 (5) of the Access to Information Act as it could reasonably be accessed through other means. As soon as the petitioners lodged their requests, attempts were made by the Respondents to refer the Petitioners to areas where they could access the information sought. The information could reasonably be accessible from the schools within the sublocations, villages, and wards specified by the Petitioner (see page 37 of DM-2), and from the website of NG-CDF Board and Mt Elgon Constituency NG-CDF Office at Kapsokwony (see page 35 of DM-2).



iv. Whether the Petitioners' children's right to basic education has been violated.

43. This complaint is founded on two allegations, firstly, that children from the Ogiek community have been either denied or discriminated during bursary allocations and, secondly, that schools dominated by members of the Petitioners' community have been left out of CDF projects.
44. On bursaries, the Petitioners have made broad and swiping remarks about children from the Ogiek community being discriminated in bursary allocations without evidence of any single needy applicant from the community who was denied bursary on account of their ethnicity. While we do not dispute that the Ogiek are marginalized community, with respect to the specific allegations raised in this Petition, unfortunately they have failed to discharge their burden of proving their allegations on a balance of probabilities.
45. On school projects, the Petitioners have conveniently cherry-picked isolated incidents such as the case of Bukonoi Primary School to allege discrimination in favour of an unidentified community. Unfortunately, such anecdotal cases as referred to by the Petitioners cannot, without context, lead to a reasonable inference of discrimination. At Paragraph 34 and Page 11 of the Affidavit the 1st Respondent has tabulated a list of 11 schools that have received funding ranging from Kshs 500,000 to Kshs 2,000,000 over a 7-year period from 2014 to 2021. These are the schools that are located within areas predominantly occupied by the Ogiek/Ndorobo as asserted in Paragraph 39 of the Petition. They therefore urge the Honourable Court to find that the alleged violations of article 53 are vague, imprecise and not supported by evidence.
46. The 1st Respondent submitted on issues v) and vi) jointly, that is, whether the Petitioners' collective rights to fair distribution of national government resources through the NG-CDF has been violated; and whether the 2nd Respondent has violated the principles of social justice, inclusiveness, non-discrimination and protection of the marginalized, transparency and accountability.
47. It is trite law that a party alleging that his constitutional rights or fundamental freedoms have been violated is under a duty to, with reasonable precision, state the Articles of the Constitution which grant the rights allegedly violated and particularize the manner and extent of the violation. See *Anarita Karimi Njeru v Republic* [1976-80] KLR 1272, [1979] KLR 154 as reaffirmed by the Court of Appeal in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
48. The rule is intended to give fair notice to responding party to enable the party and the court to understand the true nature and scope of the claim and, as observed in *Anarita Karimi Njeru*, thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. The title of the Petition lists allegations violations of 14 substantive articles of the Constitution ignoring paragraphs and subparagraphs of the said articles. When attempting to particularize the alleged violations committed by the Respondents at paragraphs 59 to 63, the Petitioners seem to have narrowed down to six articles namely Articles 47, 50, 35, 10, 201(b)(iii) and 27. However, in their prayers against the 1st Respondent at Pages 21 to 22 of the Petition, the focus is only on article 35 of the Constitution invoked at paragraph (a) of their prayers. All the other prayers are directed against the 2nd Respondent. The petition is imprecise, incompetent and incurably defective. It is also founded on allegations not supported by evidence and not particularized as required by law.

THE 2ND RESPONDENT'S SUBMISSIONS

49. The 2nd respondent filed its submissions dated 11th October 2023. They submit that the court lacks jurisdiction, as in the first instance, jurisdiction is reserved for the 2nd respondent under section 56 (5) of the National Government Constituencies Development Act, 2015. The petition is therefore an



abuse of the Court process for reasons that the petitioners have failed to exhaust the statutory avenues available for resolving complaints under the Act. They relied on the case of Ahmed Ismail Adan & 7 Others v The National Constituency Development Fund & 2 Others [2017] eKLR where the court stated:

50. It was further submitted that the petition was filed prematurely without exhausting the readily available mechanisms. They urged the court not to hesitate to down its tools and strike out the petition because it is incurably defective, incompetent and bad in law.

ANALYSIS AND DETERMINATION

51. I have considered the rival submissions by parties and the most pertinent issue raised by the respondents is whether this court's jurisdiction to entertain the petition. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1 where the court held as follows:

"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

52. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court held as follows:

"(68). A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."

53. The 1st respondent in opposing the petition filed a preliminary objection in which it has challenged the jurisdiction of this court. In their submission, the 1st and 2nd respondents have relied on the doctrine of exhaustion. The doctrine of exhaustion was adequately explained in Geoffrey Muthinja Kabiru & another v Samuel Munga Henry & 1756 others [2015] eKLR where the court held:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

54. The respondents argue that the petitioner ought to have filed his complaint before the Board and if he was satisfied with the decision of the Board then he should have appealed to the Cabinet Secretary. Section 56 of the Act provides as follows:

"(1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.



- (2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.
- (3) 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 consensus of the parties to consider and determine the matter before the same is referred to court.
- (4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board's decision and determine the matter.
- (5) 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.”

55. I have considered the nature of the petitioner's complaint as expressed in their letters dated 5/8/2019, 16/9/2019 and 5/11/2019. The 1st petitioner's issue was that the 2nd respondent administered CDF funds in a manner that perpetuated discrimination against the Ogiek/Ndorobo community, exacerbating their marginalization. They therefore needed to be supplied with several information to determine how the funds were being managed. In essence, their complaint was majorly on the rights of marginalized communities, their right against discrimination, their right to education and the right to access information. The prayers sought in the petition also mirror the respective constitutional provisions.

56. The pivotal issue before the court is whether, in light of the circumstances surrounding the petitioner's grievance, the Board will be capable of providing them with a satisfactory resolution. The Supreme Court in *Abidha Nicholas v Attorney General & 8 Others*, PETITION NO. E007 OF 2023 held as follows:

“We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

[106] The restraint and effective remedy rule, which we find favour in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:

“44 ...we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any



Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]

[107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

[108] It was therefore sufficient that the appellant alleged that a right in the Constitution had been infringed or threatened with violation, making it clear that in light of the provisions of the Constitution and the ELC Act, the issues raised were within the original jurisdiction of the ELC.”

57. The petitioners’ sought remedies are constitutional, and it is my view that the Board could not have adequately addressed the constitutional complexities raised by the petitioner. Consequently, certain issues articulated in the complaint may have been outside the scope of their jurisdiction. The petition is therefore properly before this court.
58. Therefore, I will turn to consider the following issues raised in the petition:
- a. Whether the petitioner’s right to access information under Article 35 of the Constitution of Kenya was violated.



- b. Whether the 2nd respondent failed to grant bursaries to students in primary and secondary school inhabited by the Ogiek/Ndoromo community, and if so, whether the same violated Article 10, 21 (1), 27, 53, 56 and 201 (b) (iii) of the Constitution of Kenya.
- c. Whether there was sufficient public participation.
- d. What are the reliefs available to the petitioners?

a. Whether the petitioner's right to access information under Article 35 of the Constitution of Kenya was violated.

59. The right to access information is protected under the constitutional and legal provisions set out in Article 35 of the Constitution of Kenya, 2010 and the Access to Information Act. Article 35 (1) (a) of the Constitution provides that every citizen has the right to access to information held by the state. The Court in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR stated:

“28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

...

31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.”

60. To obtain the desired information, the petitioners were obliged to apply under section 8(1) of the Access to Information Act which provides as follows:

1. An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
2. Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.



3. The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.
61. The petitioner in their letter dated 5th August 2019 requested the 2nd respondent to supply them with information relating to implemented projects for the financial years 2017/2018, 2018/2019 and 2019/2020. They also demanded a copy of the bursary list for the said period, the plans and projects that the 2nd respondent had with respect to the Ogiek community and that a public meeting be convened within 21 days. Their letter elicited a response from the 2nd respondent who responded vide their letter dated 23/9/2019, however, the petitioners were not supplied with the information sought. The 2nd respondent in their letter instead pointed them to the NGCDF website and the notice board outside Kapsokwony to retrieve the information. They also denied the appellant's ward report minutes because those were administrative documents that could not be circulated beyond committee members.
62. The petitioners escalated the issue to the 1st respondent in their letters dated 5/11/2019 and 11/11/2019. The petitioners in their letter accused the 2nd respondent of having projects in areas that are not occupied by the Ogiek community and failing to consider that the community is a minority and marginalised community. They accused the 2nd respondent of discrimination and informed the 1st respondent that they needed information from the 2nd respondent. The petitioners' efforts to get the information sought were defeated and they referred the matter to the CAJ.
63. The CAJ in its letter dated 22nd July 2021 pointed the 1st respondents to the petitioners' letters of 5/8/2019 and 16/9/2019 requesting various information. The CAJ noted that the information disclosed on the 1st respondent's website did not have sufficient information. The 1st respondent's argument that it was not obliged to supply the information sought by the petitioner as it could be obtained through other means, (see section 6 (5) of the Access to Information Act) is therefore untenable.
64. Following the CAJ's letter, the 1st respondent in its letter dated 02/09/2021 supplied the petitioners with copies of code lists for 2017/2018 to 2019/2021, ward reports and bursaries reports/lists for 2017/2018 – 2020/2021. However, the petitioners noted that the 1st respondent only released part of the information sought. They failed to release information touching on the financial year 2020/2021 and the proposals for 2021/2022. They noted that information relating to all projects, other than bursaries, had been withheld for the period running 2017/2018 to 2021/2022.
65. However, the Code Lists provided by the 1st respondent, Exhibit SN-1, reveal that the 1st respondent availed an elaborate list of projects for the Mt. Elgon Constituency between the years 2014 to 2022. The documents have elaborately described the names of the project which include their location and the amount spent towards the project. The 1st respondent in their replying affidavit explained that Kaboywo Primary School in 2020/2021 received Kshs 2,000,000/- towards the renovation of classrooms; Kapsogom Primary School received a total of Kshs 3,000,000/- for construction of classrooms in the years 2015/2016 & 2020/2021; Kshs 270,000/- was released to Kibumet Primary School for the planting of trees and Kshs 1,000,000/- in 2016/2017 towards construction of 1 new classroom; Kaimugul Primary School, St.Jude Kaimugul Secondary School; Kaboywo Secondary School and St. Johns Secondary School Chepyuk received Kshs 2,000,000/-, Kshs 1,000,000/-, Kshs 450,000/- and Kshs 1,000,000/- respectively towards construction of classrooms. Therefore, the information on implemented projects for the financial years 2017/2018, 2018/2019, 2019/2020, 2020/2021 and 2021/2022 were provided. The petitioners were also provided with the bursary reports/lists and ward reports.



b. Whether the 2nd respondent failed to grant bursaries to students in primary and secondary school inhabited by the Ogiek/Ndoromo community, and if so, whether the same violated Article 10, 21 (1), 27, 53, 56 and 201 (b) (iii) of the Constitution of Kenya.

66. The petitioners in their submissions have urged the court to find that there was a deliberate failure to grant bursaries to students of Ogiek/Ndorobo background, however, they did not provide any evidence to support their claim. It is a principle of law that he who asserts must prove, and in this regard, section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”. The petitioners, therefore failed to prove their case to the required standard and their claim must inevitably fail.

c. Whether there was sufficient public participation.

67. The petitioners in the petition contend that the 2nd respondent has failed to accede to their request to have a public forum to receive concerns on the allocation of NGCDF funds and are in violation of Article 10 and 201 (b) (iii) of the Constitution. Section 27 (1) of the National Government Constituency Development Fund Act provides as follows:

“The Chairperson of the Constituency Committee shall, within the first year of the commencement of a new Parliament and at least every two years thereafter, convene open forum public meetings in every ward in the constituency to deliberate on development matters in the ward and in the constituency.”

68. According to the ward reports, MEC2 and MEC 3, the two reports were on public participation to identify projects to be done within the constituency for 2 years. However, the 2nd respondents only conducted public participation 2018 and 2021 as MEC2 and MEC3 were submitted in December 2018 and September 2021 respectively.

69. The two reports reveal that the 2nd respondent was not strictly adhering to the requirement that the public forums be convened at least every 2 years. Public participation is meant to inculcate public views in matters affecting the people so that whatever is undertaken is for the benefit and well-being of the people (see *Portside Freight Terminals Limited & 2 others v Okoiti & 10 others* (Civil Appeal E130 of 2023) [2024] KECA 169 (KLR) (23 February 2024) (Judgment)). The NGCDF Act recognizes that one of its objects is to provide for the participation of the people in the determination and implementation of identified national government development projects at the constituency level pursuant to Article 10 (2) (a) of the Constitution. The 2nd respondents therefore failed to adhere to the provisions of Article 10 (2) (a) of the Constitution and Sections 3 (d) and 27 (1) of the National Government Constituency Development Fund Act.

d. What are the reliefs available to the petitioners?

70. The petitioners failed to table sufficient evidence to support their claim on issues (a) and (b). There is however evidence that the 2nd respondent is not compliant with the provisions of NGCDF Act and Article 10 (2) (a) of the Constitution on public participation. The petitioners having proved its case, I hereby make the following orders:

1. A declaration be and is hereby issued that the 2nd respondent failed to convene a public forum despite the requests by the petitioners and that the 2nd respondent was in violation of Article 10



(2) (a) of the Constitution and sections 3 and 27 of the National Government Constituencies Development Fund Act, No. 30 of 2015.

2. The 2nd respondent is therefore directed to hold at least one public forum with members of the Ogiek/Ndorobo community and receive their grievances in the term 2022-2027.

71. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14TH DAY OF MARCH 2024

R.E. OUGO

JUDGE

In the presence of:

Mr. Agwata h/b Mr. Mbithi For the Petitioners- present

1st Petitioner- Present

1st Respondent- Absent

2nd Respondent- Absent

3rd Respondent- Absent

Interested Party – Absent

Wilkister -C/A

