



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E015 OF 2020
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 2, 3, 10, 21, 23, (3) (f) AND 259 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

PETER KINYUA KIMEMIA.....1ST PETITIONER
ELIMINA ATAMBA MWIMALI.....2ND PETITIONER
LILIAN ATIENO.....3RD PETITIONER
JOSPEH MAINA MWIHAKI..... 4TH PETITIONER

VERSUS

EMBAKASI NORTH CONSTITUENCY
DEVELOPMENT FUND ACCOUNT MANAGER.....1ST RESPONDENT
NATIONAL GOVERNMENT CONSTITUENCY
DEVELOPMENT FUND BOARD.....2ND RESPONDENT
NATIONAL ASSEMBLY OF REPUBLIC OF KENYA.....3RD RESPONDENT

RULING

APPLICATION

1. The Petitioners through a Petition dated 15th July 2020 supported by Supporting Affidavit of even date seek the following prayers:-
 - a) *A declaration be made that the Petitioners' rights as enshrined in the Constitution with respect to fair administrative action have been infringed upon,*
 - b) *A declaration be made that the 1st and 2nd Respondents' actions purporting to hand-pick new members of the Embakasi North Constituency Development Committee and forwarding their names to the 3rd Respondent for gazettelement go against the rules of natural justice and promotion of public confidence.*
 - c) *A declaration be made that the 1st and 2nd Respondent's actions purposing to hand-pick new members of the Embakasi North Constituency Development Committee and forwarding their names to the 3rd Respondent for gazettelement are inconsistent and in contravention with the Constitution of Kenya, in particular Article 2(1) and 2 (4) thereof.*

- d) *A declaration be made that the 1st and 2nd Respondent's actions purporting to hand-pick new members of the Embakasi North Constituency Development Committee and forwarding their names to the 3rd Respondent for gazettelement are in breach of their duty to respect and uphold this Constitution in accordance with Article 3(1) of the Constitution.*
- e) *A declaration be made that the 1st and 2nd Respondent's actions purporting to hand-pick new members of the Embakasi North Constituency Development Committee and forwarding their names to the 3rd Respondent for gazettelement are contrary to the National values and Principles of Governance espoused by Article 10(1) (c) as read together with Article 10(2) (c) of the Constitution of Kenya.*
- f) *A declaration be made that the 3rd Respondent's actions of approving the names of the un-procedurally hand-picked committee members, are in breach of their duty to respect and uphold the Constitution of Kenya in accordance with Article 3(1) of the Constitution.*
- g) *An order of Judicial Review in form of an order of prohibition do issue prohibiting the 3rd Respondent from gazetting the new names hand-picked by the 1st Respondent, of the Embakasi North Constituency Development Committee Members.*
- h) *An Order of Judicial Review in form of Certiorari do issue quashing the decision by the 1st and 2nd Respondent of purporting to hand-pick and forward names of new members of the Embakasi North Constituency Development Committee.*
- i) *An order of Judicial Review in form of Certiorari do issue quashing the decision by the 3rd Respondent to approve the hand-picked names of the committee members.*
- j) *A conservatory order be issued, staying the staying the staying the term of the outgoing Embakasi North Constituency Development Committee members, until the matter is heard and determined.*
- k) *Compensation by damages to be assessed by the court for the violation of the Bill of Rights and the Constitution.*
- l) *Any other relief that this Honourable Court shall deem fit by dint of Article 23(3) of the Constitution of Kenya, 2010 and is just to grant in the circumstances.*
- m) *Costs of this Petition.*

2. Simultaneously with the filing of the Petition the Petitioners filed a Notice of Motion of the even date supported by Supporting Affidavit by Peter Kinyua Kimemia seeking the following orders:-

- a) *Prayer No.1 spent.*
- b) *That the Honourable Court be pleased to issue a conservatory order restraining the 3rd Respondent from gazetting the names of proposed Embakasi North Constituency committee members un-procedurally hand-picked by the 1st Respondent.*
- c) *That the Honourable Court issue conservatory orders staying the term of the outgoing Embakasi North Constituency Development Committee members, until this matter is heard and determined.*
- d) *That costs of this Application be provided for.*

1ST AND 2ND RESPONDENT'S RESPONSE

3. The 1st and 2nd Respondent filed ground of opposition dated 8th September 2020 setting out two main grounds of opposition as follows:-

- a) *That this Honourable Court lacks jurisdiction to determine the Notice of Motion Application and Petition dated 15th July 2020 for reasons inter-alia, that jurisdiction in the first instance is reserved for the 2nd Respondent under Section 56 (3) of the National Government Constituencies Development Act, 2015 (hereinafter "the Act").*
- b) *That the Petition and Application dated 15th July 2020 are an abuse of the process of this Honourable Court for reasons that the Petitioners have not exhausted the statutory avenues available for resolving their complaints under the Act.*

4. The 1st and 2nd Respondents further filed **Preliminary objection** dated 8th September 2020 setting out three grounds of objection as follows:-

- a) *That this Honourable Court lacks jurisdiction to determine the application dated 25th August 2020 for reasons inter-alia, that jurisdiction in the first instance to hear and determine the Petition and Notice of Motion Application dated 15th August 2020 from where this application emanates form is reserved for the 2nd Respondent under Section 56 (3) of the National Government Constituencies Development Act, 2015.*

b) That the Notice of Motion Application dated 25th August 2020 is incurably defective, incompetent and bad in law and ought to be struck out with costs as the same is anchored on repealed Section 5(1) of the Judicature's Act, Cap 8 of the Laws of Kenya.

c) That the impugned conservatory orders issued by this Honourable Court on 27th July 2020 are null and void ab initio for reasons that they offend Section 43(4) of the Act which reserves the powers of appointment and gazettement of nominees for the 2nd Respondent and not the 3rd Respondent.

THE 3RD RESPONDENT'S RESPONSE

5. The 3rd Respondent in opposition to the Petition and application filed Notice of Preliminary Objection dated 12th October 2020 setting out four main objections as follows:-

a) This Honourable Court lacks jurisdiction to determine the Petition and the Petitioners' pending applications because the Petitioners question the appointment and approval of Embakasi North CDF Committee members, which is a matter falling within the exclusive jurisdiction of the Employment & Labour Relations Court under Article 162(2)(a) of the Constitution and Section 12 of the Employment & Labour Relations Court Act (No. 20 of 2011).

b) This Honourable Court lacks jurisdiction to determine the Petition and the Petitioners' pending applications because:-

i. The approval process at the National Assembly through its committees is the mandatory proper forum for the determination of any question on the nomination of any persons to state or public office.

ii. Any person who fails, neglects or refuses to challenge the nomination exercise before the National Assembly during the approval process cannot invoke this Court's jurisdiction to review the findings of the National Assembly.

c) This Honourable Court lacks jurisdiction to determine the Petition and the Petitioners' pending applications because:

i. If the orders sought are granted, they will adversely affect Members of Embakasi North CDF Committee.

ii. Members of Embakasi North CDF Committee are necessary parties yet they have not been enjoined to the Petition; and

iii. The Court lacks jurisdiction to grant adverse orders against persons not before it.

d) This Honourable Court lacks jurisdiction to determine the Petitioner's application for contempt of Court because:

i. Neither the Petition nor the Court orders made in this matter were served on the 3rd Respondent.

ii. The 3rd Respondent had no knowledge, express, constructive or otherwise, of the existence of the Court orders and the Petition; and

iii. Under Section 43(4) of the National Government Constituency Development Fund Act (No. 30 of 2015), the National Assembly's role is limited to approval of the committee members. Gazettement is within the exclusive domain of the NGCDF Board.

THE PETITIONERS RESPONSE

6. The Petitioners filed a Replying Affidavit by Peter Kinyua Kimemia sworn on 19th April 2021 in opposition of the Respondents Preliminary Objections.

ANALYSIS AND DETERMINATION

7. Upon consideration of the Petition, the grounds of opposition; the Preliminary Objection and the Petitioners' Replying Affidavit, and the pleadings herein only one issue arise for determination, thus:-

a) Whether this Court has jurisdiction to hear and determine the application and the Petition.

8. The Respondents filed Preliminary Objections to the Petitioners Petition. I find it reason before I proceed to consider the preliminary objection to state what preliminary objection means *Newbold P. (as he then was)* in the Landmark case of *Mukisa Biscuit Co. Ltd vs. West End Distributors Ltd. [1969] 1EA 696*, explains it thus:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In litigation it is clearly provided that a party may raise a preliminary objection on the jurisdiction or any other matter at any stage of the proceedings. Confirming this, the *late Madan J., in Official Receiver vs. Sukhdev [1970] EA 243* held thus:

“on the preliminary objection being moved, Mr. Satish Gautama, Counsel for the Applicant, to my astonishment, said there must be a limit to the number of preliminary objections which a party is allowed to raise.... ..”

I peremptorily rejected Mr. Gautama’s submission. It was verbiage. In a Court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any Court to refuse to hear an objection even if it appears meritless or tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of a denial to take place. The Court may disallow an objection, reject a motion or refuse a plea, but it must never refuse to hear it. A court of law is for the preservation not usurpation of the rights of the parties.” (Our emphasis)

10. Further in *Kalpna H. Rawal & 2 others vs. Judicial Service Commission & 3 others [2016] eKLR, Mutunga, the learned CJ and P. (as he then was)*, augmented the late Justice Madan’s words in *Official Receiver vs. Sukhdev* as follows:

“I have already stated that Mr. Omtatah’s Preliminary Objection is not anchored on jurisdiction although it is labelled as such. Does that disqualify it as a Preliminary Objection? Mr. Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction, it is not the only ground. It is for this reasons that, Law JA in Mukisa Biscuit Co. gave jurisdiction and limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should therefore not be regarded as closed. Depending on the facts and circumstances of a particular case, they may be other grounds for raising a Preliminary Objection.” (Emphasis added)

11. A preliminary objection ordinarily should be raised at the earliest possible opportunity and should clearly raise pure points of law and not points of facts. That once the issue of jurisdiction is raised, it must be determined in limine and where Court finds that it lacks jurisdiction, it must down its tools. This preposition was well enunciated by the Late Nyaangi JA *in the Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Limited [1989] 1 KLR* where it was stated as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obligated to decide the issue right away on the material before it. 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 need for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Recently, the Court of Appeal in *Nairobi Civil Application No. E121 of 2021, The AG vs. Tolphine Nafula and others (2020) eKLR* held that jurisdictional issue must be determined first before the Court issues any conservatory orders or interim orders. *Any orders issued before the issue of jurisdiction is determined risks being null and void*, In the Court’s own words it was stated thus:-

“It has been argued, as is borne out by the record, that the learned Judges of the High Court failed to address the threshold question of whether they had the requisite jurisdiction, the legal power or authority, to entertain and determine the petitions or any proceedings connected therewith. Jurisdiction had been objected to on the basis that as the removal of a member of a Constitutional Commission had been raised by the petitioners, the proper forum and procedure to address the issue was the National Assembly, by way of a Petition presented thereto by dint of Article 251 of the Constitution. That article sets out in elaborate terms the process, including presentation of a Petition to, and consideration thereof by, the National Assembly, and appointment of a tribunal to investigate the matter, before recommendation to the President for removal.

It seems to us quite obvious that with such objection before it, the High Court was obligated to make a determination on it. To fail to pronounce on it and proceed to issue conservatory orders opened that Court to the perception of possible judicial overreach, a usurpation of jurisdiction to enquire into a matter reserved to a different and competent authority, contrary to the doctrine of deference. The matter is clearly one that the bench seized of the intended appeals will have to take argument on, and render a decision. It is doubtless(ly) arguable given the centrality of jurisdiction, to advance without which renders every step taken null and void.” (Emphasis added)

13. Similarly Supreme Court in the case of *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 others [2011] eKLR* stated:-

“A Court’s jurisdiction flows from the 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 to itself jurisdiction exceeding that which is conferred upon it by law.”

14. The Petitioners on the issue of jurisdiction contend that this Court has jurisdiction to hear and determine the Petition and the application. It is Petitioners contention that a Court’s jurisdiction flows form either the Constitution or legislation or both placing reliance in the case of *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others [2012] eKLR*.

15. The Petitioners urge that *Article 165(3) (b) of the Constitution of Kenya, 2012* vests the High Court with jurisdiction to determine whether a right or a fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened. *Articles 165(3) (b)* states as hereunder:-

“Subject to clause (5), the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom

in the Bill of Rights has been denied, violated, infringed or threatened.”

16. The Petitioners contend the Petition before this Court is in nature of Constitutional and Human Rights whereby the Petitioners indicate that their right to fair administrative action have been violated and seek among other orders that this Honourable Court declare, that the Petitioners’ rights as enshrined in the Constitution with respect to fair administration have been infringed. In view where the Petitioners aver that this Court has jurisdiction to entertain this Petition.

17. It is further contended that the Petitioners are seeking orders of Judicial Review in form of prohibition and certiorari to prohibit the 3rd Respondent from gazetting the names of the hand-picked committee by the 1st Respondent and to quash the decision of the 1st & 2nd Respondents from purporting to hand-pick and forward names of new members of the Embakasi North Constituency Development Committee respectively. The Petitioners further assert that **Order 53 Rule 1 of the Civil Procedure Rules, 2010** vests the High Court with jurisdiction to issue orders in form of mandamus, prohibition and certiorari. The order states as below:-

“No Application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

18. In addition to the above the Petitioners place reliance in the case of **David Kimani Karogo Vs. Thika Land Disputes Tribunal & 2 others [2017] eKLR** where the Court stated as follows:-

“The Court has perused the provisions of Order 53 and has not seen any specific provision of manner of how an application for judicial review should be framed. Specifically order 53 rule 3(1) provides that an application for orders of mandamus, prohibition or certiorari shall be made by way of Notice of Motion to the High Court...”

19. The 1st and 2nd Respondents urge that this 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 (Hereinafter “The Act”)**.

20. It is further urged that the application and Petition are an abuse of the Court process for reasons that the Petitioners have failed to exhaust the statutory avenues available for resolving their complaints under the Act.

21. **Section 56(1) of the National Government Constituencies Development Act, 2015**, provides that:-**“All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance. Further Subsection 3 states that 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.**

22. The disputes envisaged under the Act as arising and subject to disposal before a competent arbitrator include disputes arising out of nomination, approval and even gazettment of the committee members. The Petitioners therefore were obligated under the Act to exhaust the dispute resolution mechanisms availed to them under statute first before presenting a Petition for determination by this Court. This the Petitioners opted to ignore for no apparent reason.

23. To buttress the above reliance is placed in the case of **Ahmed Ismail Adan & 7 others vs. The National Constituency Development Fund Board & 2 others vs. The National Constituency Development Fund Board & 2 others [2017] eKLR**, where the facts of the case were similar to the instant Petition and where it was stated that:

“...An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute.... Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other constitutional designated organs, the jurisdiction of this Court should not be invoked until such mechanisms is exhausted...” (Emphasis mine)

24. In the instant Petition, the Petitioners have not demonstrated to this Court that they indeed exhausted the existing statutory mechanism which involves the selection of a competent arbitrator by parties to resolve the subsisting dispute and have faced any challenges in doing so thereby requiring this Court’s intervention. I find, that instead the Petitioners opted to go on a frolic of forum shopping by filing a complaint before the 2nd Respondent and simultaneously, a Petition and application before this Court raising the same issues. The Petitioner’s actions thus amounts to an abuse of Court process and having approached this Court with unclean hands are not deserving of the remedies sought.

25. The 3rd Respondent contend that this Court lack jurisdiction since the nomination and approval of the committee members is an Employment and Labour Relations issue as envisioned by **Sections 12(1) and (2) of the Employment and Labour Relations Act**.

26. **Section 12(1) and (2) of the Employment and Labour Relations Court Act** enact as follows on the jurisdiction of the **Employment and Labour Relation Court (the “ELRC”)**:

“12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in

accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union's organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose."

27. It is clearly provided under the above provisions that there are two categories:-

a) A closed category of disputes which the ELRC has jurisdiction over; and

b) A closed category of persons who have locus standi to institute those disputes before the ELRC. The class of applicants may act in person or be represented before the Court by an advocate duly authorised to practice law under the Advocates Act or a duly appointed and authorized Trade Union Officials.

28. In the instant Petition, the Petitioners seek to quash the nomination and approval of the committee members on the allegation that they were "handpicked". This is an employment and labour relations issue which ought to be heard by the ELRC and not this Court.

29. The office of the National Government Constituency Development Fund Committees is created by **Section 43(1) of the NGCDF Act**. This Section enacts an elaborate procedure for the nomination and selection of the said committee members, who are then approved by the National Assembly before assuming office. The said Section also enacts an elaborate procedure for removal of the committee members from office.

30. Upon perusal and consideration of the instant Petition, it is clear that the issues raised in the instant Petition are therefore those of Employment and Labour Relations issues, falling within the exclusive jurisdiction of the ELRC, thus this Court's jurisdiction is excluded in deterring the matter.

31. Further, it should be noted and appreciated that any dispute touching either on violation of the Constitution or the bill of rights, falling within the category of disputes that the ELRC has jurisdiction over by virtue of **Section 12(1) and (2) of the Employment and Labour Relations Court Act**, ought to be determined by the ELRC and not this Court. The Petitioners' allegations of violation of the Constitution and their fundamental rights and freedoms arise out of employment and labour relations issues pertaining to the appointment and approval of the committee members. Therefore the proper Court to determine this issue is ELRC.

32. Reliance in support of the above proposition is placed in the case of **Attorney General & 2 others vs. Okiya Omtatah Okoiti & 14 others [2020] eKLR**, where it was held as follows:

"We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States International University (USIU) vs. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi vs. Kenyatta University & 3 others [2013] eKLR. However, the jurisdiction of those specialized Courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to Constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In Daniel Maingi Muchiri Jubilee Insurance Co. Ltd, CA No. 138 of 2016, this Court expressed the position as follows:

"The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction." (Emphasis added)."

33. The 3rd Respondent further urge that the Court lack jurisdiction to hear and determine this Petition since the Petitioners failed or refused to challenge the nomination exercise before the National Assembly during the approval process.

34. It is trite that under the doctrine of “exhaustion” where there is an alternative method of dispute resolution established by legislation, Courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.

35. The doctrine of “exhaustion” was affirmed by the Supreme Court of Kenya in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in the title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (2019) eKLR* where it was held as follows on this important doctrine:-

“[118] in the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior Courts had jurisdiction or determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the Judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the Court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not ally. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.” (Emphasis mine)

36. I note that under **Section 43(4) of the NGCDF Act** grants the 3rd Respondent the mandate to approve the committee members before their appointment into office. Under the said Section, the 3rd Respondent is therefore the body with first instance jurisdiction to address all issues (factual or otherwise) regarding the nomination of the committee members, before approval is made in accordance with the provisions of the law.

37. Upon perusal and consideration of the pleadings in this Petition, it is clear that the Petitioners have not given any reasons why they did not raise any objection with the 3rd Respondent, to whom they ought to have first approached and raised the issues they had. I find by failing to do so; this Court, being not Court of first instance, the Court, in my view, lacks jurisdiction to interfere, or review the approval process carried out in accordance with the provisions of the law by the National Assembly.

38. To buttress the above proposition reliance is placed in the case of *Okiya Omtatah Okoiti vs. National Executive of the Republic of Kenya & 5 others; Katiba Institute (KI) & 3 others (Interested Parties) [2020] eKLR*, where it was held the Petitioner had similarly failed to raise his concerns before the National Assembly during the approval process:-

“The Court finds that the Petitioner’s concerns about the suitability of the persons who sat in the interview committee and whether the 6th Respondent had all or any of the minimum requirements for appointment as Controller of Budget were all matters within consideration and determination by the Committee of the National Assembly that vetted the 6th respondent as provided for in the Public Appointments (Parliamentary Approval) Act No. 33 of 2011. The Court finds that the Committee was the proper forum and that forum not having been moved accordingly, the respondents have thereby established a bar to this Court’s jurisdiction to intervene. Had the petitioner exhausted that forum, then he would have properly established the Court’s jurisdiction as the proper forum to review the Committee’s decisions on merits as appropriate.” (Emphasis added)

39. In view of the facts raised in this case and authorities relied upon, I find and hold that this Court lacks jurisdiction since the Petitioners failed and ignored to challenge the nomination exercise before the National Assembly during and before the approval process.

40. The 3rd Respondent further contend, that this Court lacks jurisdiction to make adverse orders against parties who have not been joined in these proceedings.

41. It is contended that the orders sought, will if granted, affect Embakasi North NGCDF Committee members, who are not parties to these proceedings. The committee members are necessary parties to these proceedings as the Petitioners seek declarations which will essentially lead to their removal from office, thus, affecting their fundamental rights and freedoms. The Petitioners ought to have enjoined the Committee Members as parties to the Petition and the application for conservatory orders. There has been no attempt to join the Embakasi North NGCDF by the Petitioners at any one given time.

42. It therefore follows the Petitioners failure to join the Embakasi’s North NGCDF does not only render the Petition incompetent, but also goes to the heart of this Court’s jurisdiction. It would be contrary to the rules of natural justice and the right to fair hearing protected under **Articles 25(c) and 50(2) of the Constitution**, if this Court were to grant the orders sought in the Petition without first affording the committee members a hearing.

43. I find the question of whether the Court lacks jurisdiction to grant adverse orders against parties not before it is not novel. A similar issue arose in *National Gender & Equality Commission (NGEC) vs. Independent Electoral & Boundaries Commission (IEBC) & 3 others [2018] eKLR*, in which the Hon. Mr. Justice Mativo, commenting on the importance of the non-derogable right to fair hearing and the time-

tested rules of natural justice, stated as follows:-

“The term “entitled to defend” confers an inherent right to a person if he or she is affected or is likely to be affected by an Order to be passed by any legal forum, for there would be violation of natural justice. The principle of audi alteram partem has its own sanctity. That apart, a person or a body must have a legal right or right in law to defend or assail.”

44. On the importance of observing the rules of natural justice, and in particular hearing a person who is likely to be adversely affected by the decision before the decision is made is of great importance and should not be taken lightly in view of any claim before a Court of Law.

45. In view of the above, I have no doubt in view of the facts of this case, to state that this Court lacks jurisdiction to issue any of the prayers sought in the instant Petition and the application for conservatory orders without first hearing from the Embakasi North NGCDF who are necessary parties and who have not been enjoined in these proceedings.

46. ***The upshot is that:-***

a) The Preliminary objection by the 1st and 2nd Respondents dated 8th September 2021 and Preliminary Objection by the 3rd Respondent dated 12th October 2020 are meritorious and are accordingly upheld.

b) The Application for Conservatory orders and the Petition are both dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA