



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CONSTITUTIONAL PETITION NO. 6 OF 2019

IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES 22, 23, 47, 50

AND

IN THE MATTER OF ARTICLES 3, 22 & 258 OF THE CNSTITUTION

AND

IN THE MATTER OF DISCRIMINATION, UNFAIR ADMINISTRATIVE ACTION AND IN VIOLATION OF THE BILL OF RIGHTS AND PROVISIONS OF THE CONSTITUTION AS THE SAME RELATE AND CONCERN THE APPLICANT

BETWEEN

- 1. JAMES MARIENGA OBONYO**
- 2. PHILIP OGWARI MWABE**
- 3. JAOKO TOBIAS DEMBA.....PETITIONERS**

VERSUS

- 1. FUND MANAGER SUNA WEST NATIONAL GOVERNMENT
CONSTITUENCY DEVELOPMENT FUND COMMITTEE**
- 2. NATIONAL GOVERNMENT CONSTITUENCY
DEVELOPMENT FUND BOARD.....RESPONDENT**

RULING NO. 1

1. The three Petitioners herein who are Members of the Suna West Constituency Development Fund Committee instituted the current proceedings by way of a Constitutional Petition through the firm of **Messrs. Mauwa & Company Advocates**. The Petition which alleges infringement and violation of the Petitioners' rights under **Articles 22, 23, 47 and 50** of the **Constitution** was on filed on 14/08/2019. Contemporaneously with the said Petition the Petitioners filed a Notice of Motion seeking conservatory orders. The application was placed before the Duty Judge on 15/08/2019 where interim conservatory orders were issued.

2. Upon service of the Petition the First Respondent entered appearance through the firms of **Messrs. Omonde Kisera & Company Advocates** and **Messrs. Tom Mboya & Company Advocates** while the Second Respondent entered appearance through the firm of **Messrs. Otieno, Yogo, Ojuro & Company Advocates**. The firm of **Messrs. Omonde Kisera & Company Advocates** also filed a Notice of Preliminary Objection dated 06/09/2019 challenging the jurisdiction of the High Court to hear and determine both the Petition and the interlocutory application.

3. Directions were given by this Court and the Notice of Preliminary Objection was heard way of oral submissions on 16/09/2019. The Notice of Preliminary Objection was elaborately and eloquently presented on one hand and vehemently opposed on the other hand. Counsels for the Respondents expounded on the objection and strenuously argued that this Court's jurisdiction is ousted by **Section 56** of the **National Government Constituencies Development Fund Act, No. 30 of 2015** (hereinafter referred to as '**the CDF Act**') which creates a distinct dispute resolution mechanism and which mechanism the Petitioners cannot depart from. Counsels submitted that all the Petitioners' complaints are administrative in nature as they revolve around whether the Petitioners have been excluded from conducting the affairs of the **Suna West National Government Constituency Development Fund** (hereinafter referred to as '**the Suna West CDF**'), whether the Suna

West CDF is properly constituted and whether fraud is perpetrated at the Suna West CDF. It was hence argued that since the dispute between the parties herein is on the administration of the **Suna West CDF** then the dispute instead ought to be dealt with by the **National Government Constituency Development Fund Board** (hereinafter referred to as '**the Board**'). The Respondents contend that the Board has the entire mandate to, in the first instance, deal with any matter on the administration of the Suna West CDF and in the event the dispute reveals criminal culpability then it is the Board to forward the dispute to the relevant institutions.

4. Responding to the Petitioners' position that they approached this Court as the Board is not intent on dealing with the dispute which they presented several months ago, the Respondents posit that the Petitioners ought to have instituted judicial review proceedings to compel the Board to hear and determine the dispute instead of filing a Constitutional Petition. It is submitted that couching a dispute which falls under the ambit of the Board as a constitutional issue does not oust the jurisdiction of the Board as donated under **the CDF Act** since the Board is also guided by the **Constitution** while discharging its mandate. Counsels further urged this Court to uphold the provisions of **Article 159** of the **Constitution** and allow the objection. The Respondents relied on the persuasive decisions of **Migori HC Petition No. 8 of 2015 Silas Owiti Maswa versus Anne Mikoyo and Others (2016)eKLR**, **Peter Ochara Anam and Others versus CDF Board and Others Kisii HC Petition No. 3 of (2011)eKLR**, **James Cheruyot versus National Government Constituencies Development Fund and Others (2018)eKLR** **Nakuru HC Petition No. 40 of 2017**, **Nakuru HC Petition No. 36 of 2014 Wilson Wachira Nhujiri and another versus Oljororok Constituency development Fund & Others (2014)eKLR**, **Meru HC Petition No. 12 of 2015 (2016)eKLR** **Gitonga Mithika and another versus Chairperson Igembe CDF Committee and Others and Nairobi HC Petition No. 439 of 2014 (2014)eKLR** **George Morara Manyara versus CDF Board and Another** in contending that this Court ought to strike out the Petition together with the interlocutory application with costs.

5. In opposing the objection, the Petitioners submit that this Court is seized of the jurisdiction to deal with the Petition since the Petition is brought under **Articles 22, 23, 47 and 50** of the **Constitution** and **Section 4** of the **Fair Administrative Action Act, 2015** so as to compel the Board to determine the dispute they lodged before it sometimes in March 2018. The Petitioners instead clarified that the Petition is not for the determination of the dispute at the Suna West CDF. It is contended that the massive fraud which is perpetrated at the Suna West CDF which constitute the dispute is a matter of grave public concern and that the Petition is brought in public interest. Counsel distinguished the decisions relied to by the Respondents in asking this Court to dismiss the objection and proceed on with the Petition.

6. For ease of this discussion I hereby reproduce the Notice of Preliminary Objection verbatim: -

1. That this Honourable Court lacks Jurisdiction to in anyway deal with the Petition and the Application dated 18th July 2019 and 14th August 2019 respectively herein by dint of Section 56 of the National Government Constituencies Development Fund 2015.

2. That the Petition and the Application are legally untenable.

3. The Jurisdiction of this Honourable Court cannot be invoked where there is a dispute Resolution Mechanism mandatorily provided for under the National Government Constituencies Development Fund Act of 2015.

4. The Petition and the Application are pure abuse of the process of this Honourable Court.

7. Since the issue under consideration was raised by way of a Preliminary Objection, a look at the law on preliminary objections is of utmost importance. **Law, J.A.** in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

8. My brother **Mwita, J.** in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in clearer terms when he stated that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

9. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J (as he then was)** in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of **Law, J.A.** in the **Mukisa Biscuits case (supra)** went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

10. By juxtaposing the jurisdictional point raised by the First Respondent herein and the law on preliminary objections I find that the

objection clearly meets the appropriate competency bar as it is a pure point of law capable of disposing the entire matter before this Court if it is upheld.

11. Turning to the issue of jurisdiction, I must state that the subject of Courts' jurisdiction is by now well settled. For instance, My Lordship **Ibrahim, JSC** in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** and expressed himself as follows: -

...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...

12. The Court of Appeal more recently in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

13. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

14. At the earliest possible opportunity, a Court must satisfy itself on the jurisdiction over the matter. If it finds that it is not seized of such then it must down its tools forthwith. There are no two ways about it. Conversely, if the Court arrives at a finding that it is properly seized of jurisdiction it must unreservedly discharge its mandate in accordance with the law. To enable this Court determine whether it has requisite jurisdiction a look at the Petition is of paramount importance.

15. As said, the Petition is anchored on **Articles 22, 23, 47 and 50** of the **Constitution** and prays for the following orders: -

- (a) A declaration that the petitioner's rights have been violated and is threatened with further violation.**
- (b) A declaration that by brazenly infringing on the rights of the petitioner, the Respondent has acted unconstitutionally and thus its members and Chief Executive Officer are not fit to hold Public Offices**
- (c) An order of Judicial Review in the Nature of Mandamus bringing into this court and compelling the 2nd Respondent to hear and determine the petition before it expeditiously.**
- (d) An order of Judicial Review in the nature of Mandamus compelling the 2nd Respondent to halt any further disbursement of monies to the 1st respondent monies which ought to be subject of the Suna West National Government Constituency Fund Committee deliberations pending.**
- (e) An order that the Petitioner is entitle to compensation quantum of which be assessed by the Court for the past violation and continued violation of his constitutional and human rights.**
- (f) Such other or further relief this court deems just and fit to grant.**
- (g) The costs of and occasioned by this petition be borne by the Respondent.**

16. The Petitioners trace the background of the Petition to how the First Respondent has been running the affairs of the Suna West CDF in contravention of the **Constitution** and the law. In an attempt to intervene and restrain the First Respondent and the Suna West CDF from committing further breaches of the law the Petitioners first engaged the National Government through the Deputy County Commissioner Suna West, but in vain. They in turn engaged the services of their Counsel who formally wrote to the Board on the dispute and sought the Board's determination. That was way back in March 2018. To date, which is over 18 months later the Board has not determined the dispute in anyway whatsoever despite acknowledging receipt of the Petitioners' letter on the dispute. It is on that background and pursuant to the

Petitioners role in the Suna West CDF Committee that they reverted to this Court with a view of asking this Court to compel the Board to discharge its mandate by *inter alia* hearing and determining the dispute. To that end the Petitioners are clear that this Court cannot assume the mandate of the Board and attempt to determine the dispute by itself.

17. It is on that background that the Petitioners contend that their constitutional right to a fair administrative action under **Article 47** of the **Constitution** and their right to a **Fair Hearing** under **Article 50** of the **Constitution** have been and continue to be infringed by the Board.

18. The **Constitution** creates **Rights and Fundamental Freedoms** in **Part 2** thereof which are in **Article 26** to **Article 51** inclusive. These **Rights and Fundamental Freedoms** are also referred to as '**The Bill of Rights**'. **Article 23(1)** of the **Constitution** provides as follows on the Court's jurisdiction in respect to the Bill of Rights: -

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

19. **Article 165(3)(b)** of the **Constitution** provides as follows: -

(3) Subject to clause (5), the High Court shall have –

(a)

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

20. On their *locus standi* to institute these proceedings, the Petitioners invoke **Articles 3, 22** and **258** of the **Constitution**. **Article 3** of the **Constitution** imposes a duty on every one to respect, uphold and defend the **Constitution**. **Article 22** is on the enforcement of the Bill of Rights and gives the right to every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The Article also gives instances where such proceedings can be undertaken on behalf of others.

21. The foregone therefore settles the fact that any person who claims that his or her or its right or fundamental freedom in the Bill of Rights (that is under **Article 26** to **Article 51** inclusive) has been denied, violated or infringed, or is threatened with violation has a right under **Article 22** of the **Constitution** to institute proceedings for an appropriate relief in the High Court. Once such proceedings are instituted **Article 23(1)** and **Article 165(3)(b)** of the **Constitution** gives the High Court the jurisdiction to hear and determine the proceedings.

22. The question which now begs an answer is whether the Petition seeks to enforce any of the rights and fundamental freedoms in the Bill of Rights. As pointed out above the Petition is anchored on **Articles 22, 23, 47** and **50** of the **Constitution**. **Article 47(1)** and **(2)** of the **Constitution** provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

23. **Article 50(1)** of the **Constitution** is tailored in the following manner: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

24. A reading of the Petition reveal that the Petitioners seek to enforce two of their rights under the Bill of Rights, that is under **Articles 47** and **50** of the **Constitution** to the extent that they are aggrieved by the inaction on the part of the Board in determining the dispute they referred to it. That therefore brings the Petition squarely within the jurisdiction of the High Court courtesy of **Articles 22** and **23** of the **Constitution**.

25. On the reliefs sought, the Petition majorly seeks to compel the Board to hear and determine the dispute before it. To that end, the Petitioners have *inter alia* sought for declarations and other orders in the nature of judicial review. But can the High Court grant judicial reviews orders in proceedings under **Articles 22** and **23** of the **Constitution**? The answer to that question is in the **Constitution**. **Article 23(3)** of the **Constitution** states as follows: -

In any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the

Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

26. Therefore, when the High Court is dealing with proceedings under **Articles 22 and 23** of the **Constitution** it may in appropriate instances grant judicial review orders of Certiorari, Mandamus and Prohibition.

27. Having said so, I will now look at the place of **Section 56** of the **CDF Act** in these proceedings. The said section states 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.

28. The complaints and disputes contemplated under the said law relates to those on the administration of the **CDF Act**. The term '**administration**' has been defined by the Law Dictionary as follows: -

*In public law. The **administration** of governance means the practical management and directions of the executive department or of the public machinery or functions, or of the operations of the various organs of the sovereign. The term "administration" is conveniently applied to the whole class of public functionaries, or those in charge of the management of the executive department. People vs. Salisbury – 134 Mich 537, 90 N. W. 930.*

29. In the context of the **CDF Act**, '**administration of the Act**' would mean the Board discharging the functions as stipulated in **Section 16**. Those functions are as follows: -

(a) to ensure timely and efficient disbursement of funds to every constituency;

(b) to ensure efficient management of the Fund;

(c) consider project proposals submitted from various constituencies in accordance with the Ac, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;

(d) co-ordinate the implementation of projects at the inter- constituency level;

(e) receive and address complaints that may arise from the implementation of the Act;

(f) encourage best practices in the implementation of projects;

(g) administer the funds and assets of the Board in such manner and for such purpose as shall promote the best interest of the Board in accordance with the Act to ensure efficient management of the Fund; and

(h) perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.

30. **Section 16(e)** of the **CDF Act** mandates the Board to receive and address complaints that may arise from the administration of the **CDF Act**. In that case the Board is the arbiter. **Section 56** of the **CDF Act** does not encompass disputes which are outside the ambit of the administration of the **CDF Act** which may include disputes where the Board is a party since no party can be a Judge in his/her/its own case. In the event disputes which are outside the administration of the **CDF Act** arise then they can only be dealt with in other fora.

31. There is no doubt that the Board received the Petitioners' complaint way back in March 2018 and acknowledged receipt. However, the complaint is yet to be addressed. It is that aspect which has brought the Petitioners before this Court. The Petitioners are therefore not before Court for the resolution of the dispute at the Suna West CDF which case would bring them under **Section 56** of the **CDF Act** but instead they

seek to compel a public entity to discharge its public duty. I therefore find and hold that the dispute before this Court is not in respect of the administration of the **CDF Act** and as such **Section 56** of the **CDF Act** does not apply in the unique circumstances of this case.

32. As I come to the end of this ruling I must say something in respect to **Migori High Court Constitutional Petition No. 8 of 2015 Silas Owiti Masawa v Anne Mikoyo & 7 Others (2016) eKLR** (hereinafter referred to as '**Petition No. 8**') which I handled and rendered a ruling on jurisdiction sometimes in 2016 and which decision has been greatly relied upon by the Respondents in their submissions. Petition No. 8 is clearly distinguishable from the current proceedings. The reason I allowed the objection and held that the High Court did not have the requisite jurisdiction is that the Petitioner in Petition No. 8 sought to be reinstated into the Chairmanship of the Awendo CDF Committee after the Committee had removed him from the Chair of that Committee. To me, that was a dispute squarely falling within the ambit of **Section 56** of the **CDF Act**. However, that is not the case herein and as such the decision is inapplicable. I also find that the rest of the decisions relied upon by the Respondents are equally distinguishable from this case.

33. The upshot is that the Preliminary Objection dated 06/09/2019 has no legal leg to stand on and as such it is for rejection. The same be and is hereby dismissed with costs.

34. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of September 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Mauwa Counsel instructed by the firm of Messrs. Mauwa & Co. Associates Advocates for the Petitioners.

Mr. Omonde Kisera Counsel instructed by the firm of Messrs. Omonde Kisera & Advocates and **Mr. Brian Mboya** Counsel instructed by the firm of Messrs. Tom Mboya & Co. Advocates both for the First Respondent.

No appearance from Messrs. Otieno, Yogo, Ojuro & Company Advocates for the Second Respondent.

Evelyne Nyauke – Court Assistant