



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTIONAL PETITION NO. 11 OF 2016

AHMED ISMAIL ADAN

ADAN HASSAN GEDO

MOHAMMED ALI MOHAMED

MAIMUNA SAID NURKEY.....PETITIONER

NUR BARSHEY AHMED

ADAN ABDULLAHI ISHMAEL

ABDIKADIR MURSAL OMAR

MOHAMED MUKTAR OMAR

MOHAMED ALI

VERSUS

THE NATIONAL CONSTITUENCY

DEVELOPMENT FUND BOARD.....RESPONDENTS

HON IBRAHIM ABDI SANEY

WAJIR NORTH CDF COMMITTEE

RULING

This ruling relates a preliminary objection raised in this matter by the 3rd respondent the Wajir North CDF Committee.

The background is that the petitioners filed a petition dated 14th November, 2016 seeking the following orders

- a. A declaration that the 1st, 2nd and 3rd respondents had contravened Articles 35 and 201 of the Constitution 2010.
- b. An order to compel the 3rd respondent to avail all information to the petitioners and all residents

of Wajir North Constituency regarding on going CDF Projects and their statuses.

c. An order of prohibition, stopping the first respondent from approving and/or disbursing any moneys to the 3rd respondent until the third respondent complies with all financial management requirements by the Auditor General.

d. An order disbanding the composition of the 3rd respondent and reconstituting the 3rd respondent in accordance with the Constitution and the NCDF Act.

e. Costs of the petition.

f. Any other relief that this court may deem fit and just to grant to the petitioners.

On the same day that is 14th November 2016, the petitioners filed a Notice of Motion for conservatory orders, in which they sought the following orders:-

1. The application and petition herein be certified as urgent and be placed before the Hon Judge for hearing forthwith.

2. That pending the interparty hearing and determination of the application herein, there be conservatory orders suspending the use of funds allocated for various CDF projects by the 3rd respondent.

3. That pending the interparty hearing and determination of the application herein, the 1st respondent be restrained from approving/ endorsing any proposals by the 3rd respondent as regards the utilization of CDF Funds.

4. That pending the hearing and determination of the petition herein, there be a conservatory order suspending the use of funds allocated for various CDF project by the 3rd respondent.

5. That pending the interparty hearing and determination of the petition herein, the 1st respondent be restrained from approving/endorsing any proposal by the 3rd respondent as regards the utilization of CDF Funds.

6. The respondents be ordered to pay the applicant the costs of this application”

When the petition and application were placed before the court on 4th November 2016 in Chambers, the court certified the application as urgent and ordered that it be served on the parties for interparty hearing. The application was thus served and parties counsel appeared in court on 13th December, 2016, on which counsel for the respondents sought for more time to respond to the application. The application was thus fixed for hearing on 10th January 2017.

In addition to filing a replying affidavit, the counsel for the 3rd respondent filed a Notice of Preliminary Objection to the application and the petition. The court then ordered that the Preliminary Objection would be heard and determined first on the basis of the replying affidavit and written submissions filed by the parties. Parties counsel filed their written submissions and appeared in court on 30th of March, 2017 and elected to adopt the written submissions filed.

Today’s ruling is thus on the preliminary objection filed by the 3rd respondent against both the application and the petition herein. The preliminary objection is on the following grounds:-

1. That the court lacks jurisdiction to entertain and determine the suit.

2. That the court will be usurping the jurisdiction of other legally empowered entities if it were to

entertain the suit as it is.

3. That the suit is premature hence incompetent and unavailable for court's consideration.

4. That all the prayers sought, if granted will violate the rights of parties designed to be assisted by the law in issue.”

The submissions of counsel for the 3rd respondent were that this court lacked jurisdiction to entertain this matter, and that the respondents, including the 3rd respondent, had explained and accounted for all CDF funds and had shown that no funds were lost, no funds were utilized without authority, and that questions raised in the audit were infant questions for clarification and not findings on financial impropriety or embezzlement. Counsel also submitted that the 3rd respondent maintained that the court did not have capacity to consider whether or not funds had been accounted for, and contended that the repetition had been filed in bad faith to advance political ambitions.

Counsel for the 3rd respondent further submitted that a dispute regarding the Constituency Development Fund (CDF) must first go to the Constituency Development Fund Board before the same could be taken to court in accordance with the provision of section 6, 24, 49 and 56 of the National Constituency Development Fund Act, 2015 as read with section 41, 43, 44 and 47 of the same Act. Counsel emphasized that the jurisdiction of the court in any matter stood suspended whenever there was a clear legal provision for dealing with any particular grievance as prescribed by law and the Constitution, Statute, or judicial practice. Counsel closed by stating that the prayers of the petitioners before the court undermined the process of the law and hindered proper administration of justice.

Counsel for the 1st respondent Munyao, Muthama and Kashindi explained the mandate of the 1st respondent under the National Government Constituency Development Fund Act of 2015, and emphasized that under section 16 of the Act, it was required to ensure timely and efficient disbursement of funds to every constituency, efficient management of the fund, to consider project proposals submitted from various constituencies and approve the same, to coordinate the implementation of projects, to receive and address complaints, to encourage best practices in project implementation, and to administer funds and assets of the Board.

Counsel submitted that under section 56(1) of the Act, all complaints and disputes relating to the administration of the fund were to be forwarded to the Board in the first instance. Section 56(3) also required that disputes of a civil nature be referred to the Board in the first instance, and where necessary an administrative panel would be constituted to consider and determine the matter before reference to court. The 1st respondents counsel thus stated that this petition was premature.

Counsel for the 2nd respondent Njuguna Kimani Nduhiu & Company in their written submissions, stated that no constitutional issues had been raised by the petitioners/applicants. Secondly, section 56 of the National Government Constituency Development Fund Act had provided a mechanism for resolving such disputes. Therefore, that set statutory procedure should not be circumvented.

Counsel also submitted that the 2nd respondent was not in charge of management of the funds held by the 3rd respondent.

The petitioners did not respond to the written submissions of the respondents before the initially set ruling date of 27th April, 2017. On that scheduled date the court informed parties counsel present that it had not written the ruling. Before the court could give a fresh ruling date, however, counsel present informed the court that the advocate for the petitioner had just filed an application on the same day for admittance of their written submissions before ruling was delivered.

At that point the court had not seen either the said application or the written submissions. Counsel who had brief for the respondents Mr. Farouk however indicated that as the ruling would be delivered at a later

date, the respondents had not objection to the late submissions of the petitioners being considered by the court in the ruling.

The court felt that since the petitioners had come to court through a formal application, transparency would require that the application be served and the parties counsel could respond to the same if they wished to. As at the date of writing this ruling, however, I have not seen any response from counsel for the respondents.

In my view, since parties counsel were entitled to tender submissions either verbally or writing, the submissions of all parties presently on the file cannot be ignored by the court. I will thus consider the written submissions of the petitioner on record, as no objection has been communicated on the same to the court.

The submissions of the petitioners counsel are that their clients were entitled to come in this court to ensure that the funds disbursed for CDF projects in Wajir North Constituency were used in an open, accountable, and prudent manner. According to the issues herein were thus constitutional issues as the petitioners were denied information which they sought, and this court was thus the right forum to seek redress.

Counsel pointed out that even where there existed a parallel remedy, Constitutional reliefs could still be sought, if the alternative reliefs were not adequate. Counsel thus urged this court to dismiss the preliminary objection.

All counsel relied on a number of case authorities.

I have considered the preliminary objections raised and the submissions of all parties counsel. I have also considered the several authorities cited to me by the counsel.

Some of the arguments put in the submission of the 3rd respondent appear to be factual and contestable and cannot form part of a preliminary objection. It was claimed in the submissions that the 3rd respondent had accounted for funds; that they claim to have answered queries raised by the Auditor General: and that they were accountable. It is clear that these alleged facts were not agreed to by all parties. As such they cannot be part of the preliminary objection, nor relied upon to support the preliminary objection.

In the case of ***MUKISA BISCUIT MANUFACTURING CO LTD VS. WEST END DISTRIBUTORS LTD (1969) EA 696*** – Sir Charles Newbold P stated as follows; with regard to the meaning of what constitutes a preliminary objection.

“the first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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....”

The underlining is mine. The disputed facts relied upon by counsel for the 3rd respondent above cannot thus be part of the preliminary objection. The preliminary objection has to be on a pure point of law that arises from agreed facts.

The main point of law raised in support in the preliminary objections is the provision of section 56 of the National Government Constituency Development Fund Act 2015. Section 56 states that complaints and disputes by persons arising due to the administration of the Act shall be forwarded to the Board in the first instance. In particular section 56 (3) provides as follows:-

(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 the

consensus of the parties to consider and determine the matter before the same is referred to court.”

There is no dispute that the petitioners came to this court straight without registering a dispute with the Constituency Development Fund Board. The law as stated above is very clear that a dispute on contravention of the National Constituency Development Fund Act has to be lodged with the Board, before referring same to court. The petitioners have not lodged such a dispute as required by law before filing these proceedings.

I am alive to the fact that the petitioners have claimed that they are entitled to come straight to this court as their constitutional rights to information had been violated by the respondents. In my view, where the written law provides for an avenue for settling a dispute, that avenue has to be exhausted first before a party can approach this court. I rely on the case of INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & OTHERS Vs. A/G & OTHERS (2013) eKLR where the High Court stated:-

“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 provisions 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 mechanism is exhausted”

The petitioners have neither exhausted the existing statutory mechanism for resolving their dispute, nor have they demonstrated that the existing statutory mechanism is inadequate. Thus in my view this court does not have jurisdiction to deal with the petition at this stage.

Jurisdiction is the first issue that a court should deal with. In the case of THE OWNERS OF MOTOR VESSEL “LILLIANS” VS. CALTEX OIL KENYA LTD [1978] KLR 1, at page 14 the Court of Appeal stated as follows-

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and 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.”

In my view this court has no jurisdiction at this stage to entertain this case. The proceedings herein are premature as the petitioners have not exhausted the available legal and statutory avenues available for resolving their disputes under the National Constituency Development Fund Act 2015. If the petitioners have any dispute on the allocation, use, and application of CDF funds by the 3rd respondent they should first lodge their complaint with the Constituency Development Fund Board, before coming to this court.

As this court has no jurisdiction, I thus down the tools of this court and strike out both the application and petition herein, with costs to the respondents from the petitioners jointly and severally.

Dated and delivered at Garissa this 11th May 2017

GEORGE DULU

JUDGE