



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CONSTITUTIONAL PETITION NO.12 OF 2015**

**IN THE MATTER OF:**

**ARTICLE 22, 23 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**ALLEGED OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 33, 35 AND 47 OF THE CONSTITUTION OF KENYA**

**AND**

**ARTICLE 1, 2, 3, 10, 20, 21, 73, 75 AND 118 OF THE CONSTITUTION OF KENYA**

**AND**

**THE CONSTITUENCY DEVELOPMENT FUND ACT 2013**

**BETWEEN**

**GITONGA MITHIKA.....1<sup>ST</sup> PETITIONER**

**RAPHAEL MURIIRA MUTEA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**CHAIRPERSON, IGEMBE SOUTH CDF COMMITTEE .....1<sup>ST</sup> RESPONDENT**

**FUND ACCOUNT MANAGER, IGEMBE SOUTH CDF COMMITTEE .....2<sup>ND</sup> RESPONDENT**

**COUNTY PROJECT COMMITTEE.....3<sup>RD</sup> RESPONDENT**

**NATIONAL ASSEMBLY COMMITTEE ON CDF .....4<sup>TH</sup> RESPONDENT**

**MEMBER OF PARLIAMENT FOR IGEMBE SOUTH CONSTITUENCY .....5<sup>TH</sup> RESPONDENT**

**RULING**

[1] By a Constitutional Petition dated 13<sup>th</sup> May 2015; the Petitioners have sought the following

orders:

1. **A declaration that the Fundamental Freedoms and Rights of the Petitioner as per Article 33, 35 and 47 of the Constitution of Kenya have been violated.**
2. **A declaration that the Petitioner has a right to access to information held by the Respondents and required for the exercise of his Right and Fundamental Freedom of imparting this information to others.**
3. **An order that the following documents are made available to the Petitioner's and to the public:**
  - i. **Copies of all the Constituency projects submission forms" submitted by applicants during the financial years 2013/2014 and 2014/2015**
  - ii. **Copies of all the "project description forms" submitted by applicants during the financial years 2013/2014 and 2014/2015**
  - iii. **Copies of all the "project re allocation forms" submitted by applicants during the financial years 2013/2014 and 2014/2015.**
  - iv. **A list and details of projects approved by the Constituency Development Fund Board for projects submitted by the Igembe South CDF committee for the financial years 2013/2014 and 2014/2015.**
  - v. **A list of the companies along with their directors, that have been awarded tenders by the Igembe South CDF C committee for the financial years 2013/2014 and 2014/2015.**
  - vi. **A record of the Emergency Reserve Fund" expenditure for the financial years 2013/2014 and 2014/2015.**
4. **A Judicial Review of the process of allocation of tenders to the contractors awarded projects by the Igembe South CDF Committee for the financial years 2013/2014 and 2014/2015.**
5. **An order that a permanent injunction be issued on all the projects undertaken under by the Igembe South CDF Committee that, upon finding of the fact , have been determined to have been carried out irregularly.**
6. **That all parties to bear their costs.**
7. **Any other award that this Honourable court deems expedient.**

[2] The Respondents then took out the following Preliminary Objections contained in two Notices of Preliminary Objection filed on 25<sup>th</sup> May and 8<sup>th</sup> June 2015, to wit:

1. **That the Petition offends the provision of Section 49 of the Constituency Development Fund Act No.30 of 2013.**
2. **That the court has no jurisdiction to handle this matter.**
3. **That the Petition is fatally defective for misjoinder in respect of the 5<sup>th</sup> Respondent.**

[3] On 16<sup>th</sup> June 2015 Makau J directed that the Notice of Preliminary Objection be canvassed by way of written submissions. Parties filed their respective submission thereto which I shall consider. It was submitted for the Respondent's that Section 49 (1) of the Constituencies Development Fund Act No. 30 of 2013 provided a forum in which disputes arising from the Act are to be ventilated. And on the basis of that provision of the law, courts have held in many occasions that the court has no jurisdiction to deal with matters touching on complaints and disputes arising from the administration of the Constituency Development Fund Act. The Respondents relied on the following authorities to support their said stand point;

1. **REPUBLIC-VS- CONSTITUENCY DEVELOPMENT BOARD & 3 OTHERS NAIROBI HIGH COURT MISC CIVIL APPL NO. 264 OF 2010**
2. **STANELY MUNGATHIA DAUDI &4 OTHERS -VS- HON CYPRIAN KUBAI KIRINGO MEMBER OF PARLIAMENT IGEMBE CENTRAL CONSTITUENCY & 3 OTHERS.**

According to the Respondents, the Petitioners are purporting to oust the provisions of the Constituency Development Fund Act because they came to court before they had exhausted the remedies laid out in the CDF Act. As for the 5<sup>th</sup> Respondent, it was urged that he has been made a party to these proceedings merely because of his designation as the Member of Parliament for Igembe South Constituency. They argued that the Petitioners had not pleaded the particular misdeed, breach or wrong that the 5<sup>th</sup> Respondent had perpetrated and that there was nothing which necessitating his being named as a party in this suit. Consequently, it was submitted that his name should be struckout from these proceedings.

[4] The Petitioners took a different view of the matter. They insisted that their Petition is based on right of access to information held by state officers- a right that is anchored in the Constitution. They also asserted that their Petition was not based on the matters raised on Article 52 of the Constituency Development Fund Act.

### **DETERMINATION**

[5] First things first. Does the Preliminary objections raised true preliminary objections in the sense of the law? The law on preliminary objections was clearly stated in the case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED v WEST END DISTRIBUTORS LIMITED (1969) EA 696** as follows:

**“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

Again, Sir Charles P Newbold (as he then was) in the same case stated that:

**“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 or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”**

[5] Therefore, a preliminary objection should be straight-forward point of law which will not need probing of evidence in order to prove. And, so any point which is blurred with factual matters is not a true preliminary objection in law. I will apply this test to the facts of this case. The gist of the of this Petition is that; on 5<sup>th</sup> January 2015 the Petitioners oral request to access to information held by the Igembe South Constituency Development Fund Committee was denied and that on 12<sup>th</sup> January 2015, the Petitioners submitted a written application to the said office but the officers refused to “receive” the application and forced them out of office. The refusal by the Respondents to give the Petitioners the information requested for seems to have provoked this Petition. As the basis of the objection is that the Petitioners are purporting to oust the provisions of Section 49 of the Constituency Development Fund Act, I will set out the said provision in extenso:

#### **49. Dispute resolution**

**(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, the Cabinet Secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.**

**(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.**

[6] Section 49 is cast in mandatory terms and encompasses: *All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.* The said section 49 of the CDF Act is explicit on how disputes relating to the administration of the Fund are to be addressed or resolved; they are to be forwarded to the Board in the first instance for resolution. According to the CDF Act;

**“BOARD” means the Constituency Development Fund Board established by section 4”**

This Petition is primarily based on the fact that the Petitioners’ oral request to access information held by the Igembe South Constituency Development Fund was denied. And, that subsequent to the said refusal, they submitted a written application to the said office but the officers refused to “receive” the application and forced them out of office. Later, they submitted a copy of the written application for information to the Ministry of Devolution who duly received it on 15<sup>th</sup> January 2015 but had not responded to the request. Out of these facts, the Petitioners read infringement of right to access to information held by a state organ and which is required to enforce a right under article 35 of the Constitution.

[7] On my part, the dispute here relates to provision of internal documents of statutory transactions or activities of the CDF Committee which is a matter arising due to the administration of the CDF Act. The matter ought to have been referred to the Board for resolution in accordance with section 49 of the Constituency Development Fund Act before rushing to court. There is nothing which would prevent the Board from resolving such issue through the mechanisms provided in section 49 of the CDF Act. In fact, the Petitioners would be aptly placed if this petition had been filed upon a decision arising from the dispute resolution mechanisms under section 49 of the CDF Act. I note that the Petition seeks other far reaching orders of; (1) *A Judicial Review of the process of allocation of tenders to the contractors awarded projects by the Igembe South CDF Committee for the financial years 2013/2014 and 2014/2015; and (2) An order that a permanent injunction... on all the projects undertaken under by the Igembe South CDF Committee that, upon finding of the fact, have been determined to have been carried out irregularly.* All these are complaints or disputes which should be resolved through the laid down process of dispute resolution in section 49 of the CDF Act. When I say these things I am not oblivious of the right to access to court, except, access to justice also defers other dispute resolution mechanisms provided in law, and the authority of the implementing state organs thereto. It is trite law that constitutional petitions should be filed as a last resort. Where there exist other modes of dispute resolutions, those modes should be exhausted before filing constitutional petitions. I am supported by case law on this approach. For instance see the holding of the court in the case of **INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2013) EKL**R as referred to in the case of **DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) EKL**R thus;

**“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. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrarily to the institutional independence of IEBC granted by Article 249 of the constitution.”Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.....”**

And also Makhandia J (as he then was) when the good judge expressed similar sentiments in the case of **PETER O CHARANAM & OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eKLR** as follows:

**“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as the constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1<sup>st</sup> respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose...”**

See also Makau J exactly on Section 49 of the CDF Act 2013 in the case of **STANLEY MUNGATHIA DAUDI & 4 OTHERS –V- HON CYPRIAN KUBAI KIRINGO & 3 OTHERS MERU HIGH COURT PETITION NO. 5 OF 2013** that:

**“The section herein above is not a formality but is mandatory. A petitioner cannot be heard to say he has come to court by way of a constitutional reference with a view to oust a specific provision of a statute. The petitioner is obliged to just exhaust all the remedy as laid down in the respective statute before bringing up a petition to the High Court. A petitioner has no choice but to comply with the specifically spelled out procedure and pursue his remedy accordingly. He cannot be heard to hide behind the constitutional provisions”.**

[9] Before I close, I need to address one small issue. Nothing really turns on the argument by the Respondent that the Petition is fatally defective for misjoinder of the 5<sup>th</sup> Respondent. An objection based on that point will fail. Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in particular sub rule (b) thereof provides that:

**“a petition shall not be defeated by reason of the misjoinder or non joinder of parties, and the court may in every proceeding deal with the matter in dispute”**

[10] The upshot of all the above analysis is this. Having found that the Petitioners did not exhaust the dispute resolution mechanisms provided in Section 49 of the Constituency Development Fund Board Act, their coming to court through this petition was premature. The objection, therefore, that this Petition is premature is meritorious. Consequently the Notices of Preliminary objections filed in court on 25<sup>th</sup> May and 8<sup>th</sup> June 2015 are hereby upheld.

Accordingly I strike out the Petition. I will not, however, condemn the Petitioners to costs because theirs was a genuine endeavour to seek remedy. I am also acutely aware that, costs especially when they are of significant amounts would easily prohibit or greatly restrict the filing of such litigation which has some public spirit or public-interest component. It is so ordered.

**Dated, signed and delivered in open court at Meru this 3<sup>rd</sup> day of March, 2016.**

.....

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Petitioner in person – present

Mr. Muriuki Advocate for 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Respondent.

.....

**F. GIKONYO**

**JUDGE**