



**Mwanga & 2 others v National Government Constituencies Development Fund Board (Petition 20 of 2016) [2016] KEHC 2834 (KLR) (3 October 2016) (Ruling)**

*Victor Shiribwa Mwanga & 2 others v National Government Constituencies Development Fund Board [2016] eKLR*

Neutral citation: [2016] KEHC 2834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
PETITION 20 OF 2016  
DAS MAJANJA, J  
OCTOBER 3, 2016**

**BETWEEN**

**VICTOR SHIRIBWA MWANGA ..... 1<sup>ST</sup> PETITIONER  
FRANK MUSIEGA ADIGA ..... 2<sup>ND</sup> PETITIONER  
ALFRED AJANGA AHUTA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BOARD ..... RESPONDENT**

**Obligation of the National Government Constituencies Development Fund Board to protect and promote the rights of vulnerable persons**

*The issue in the petition was whether the Hamisi National Government Constituency Development Fund Committee violated the rights of persons with disabilities as the person nominated to represent persons with disabilities was not a person with disabilities. The court noted that the person nominated had since resigned and thus it could not issue the prayers sought. The court stated that the National Government Constituencies Development Fund Board's constitutional obligation was to ensure that the rights of vulnerable persons were protected and promoted through development of relevant regulations and policies.*

Reported by Kakai Toili

***Jurisdiction*** – jurisdiction of the High Court – jurisdiction in a petition challenging the nomination of a person to a constituency development fund committee - whether the High Court could issue orders sought in the petition where that person resigned before determination of the petition.

***Constitutional Law*** - National Government Constituencies Development Fund Board (the Board) – role of the Board - what was the role of the Board.



## **Brief facts**

1. The issue in the petition was whether the Hamisi National Government Constituency Development Fund Committee (the Committee) constituted under the National Government Constituencies Development Fund Act, 2015, violated the rights of persons with disabilities as the person nominated to represent persons with disabilities was not a person with disabilities. The petitioners sought among other orders; a declaration that the person nominated to the Committee was not a person with disability and was not seconded by a registered disability group and hence could not represent persons with disability. Along with the petition, the petitioners filed an application seeking conservatory orders staying the gazettment of nominated members of the Committee pending the hearing of the petition.

When the matter came up for hearing the court issued directions which included that; the National Government Constituencies Development Fund Board (the Bord) inquire into and establish whether the Committee was properly constituted. The Board noted that the person nominated to the Committee had resigned as a member of the Committee and it could therefore not determine whether he was a person with disabilities. When the matter came up to court for consideration of the Bord's report and directions, counsel for the respondent submitted that the petition had been resolved and should be terminated. However, counsel for the petitioners was of the view that the issue of whether the Committee was lawfully constituted was still a live issue and the court should give its decision on it.

## **Issues**

- i. Whether the High Court could issue orders sought in a petition challenging the nomination of a person to a constituency development fund committee where that person resigned before determination of the petition.
- ii. What was the role of the National Government Constituencies Development Fund Board?

## **Held**

1. From the declarations sought, the petitioner's case was focused on the rights of persons with disabilities and more specifically on representation of persons with disabilities on the Committee. The petition did not implicate the nomination and/or election of the other members of the Committee otherwise they would have been joined to the proceedings or named. The petitioner would also have pleaded how their nomination/election to the Committee was contravention of the Constitution.
2. The petition dealt with the position of the person nominated to the Committee who had since resigned. Since he had resigned, the position of persons with disabilities on the Committee was vacant. In the circumstances, the court could not issue the prayers sought in the petition. The Board's constitutional obligation was to ensure that the rights of vulnerable persons were protected and promoted through development of relevant regulations and policies.

*Petition marked as settled with no order as to costs.*

## **Citations**

### **Statutes**

#### **Kenya**

1. Constitution of Kenya, 2010 articles 28, 48, 58, 159(2)(c) - (Interpreted)
2. National Government Constituencies Development Fund Act, 2015 (Act No 3 of 2015) sections 16(e); 56(1); 43(10); 43(2)(d) - (Interpreted)

### **International Instruments**

1. Convention on the Rights of Persons with Disabilities (CRPD), 2006 — In general

### **Advocates**

1. *Mr Sore instructed by RA Onchuru & Company Advocates* for the Petitioners
2. *Mr Otieno, Yogo, Ojuro and Company Advocates* for the 3rd Respondent



## RULING

- 1 The issue in this petition is whether the Hamisi National Government Constituency Development Fund Committee (“the Committee”) constituted under the *National Government Constituencies Development Fund Act, 2015* (“the Act”) violated the rights of persons with disabilities as the person nominated to represent persons with disabilities under section 43(2)(d) of the *Act* is not a person with disabilities.
- 2 In the petition dated May 31, 2016, the petitioners sought the following prayers:
  - (a) A declaration that Oscar Buleemi is not a person living with disability and was not seconded by a registered disability group and hence cannot represent persons with disability in the Hamisi CDF committee.
  - (b) A declaration that the nomination process for the Hamisi CDF committee members was irregular, null and void.
  - (c) An order restraining the 3<sup>rd</sup> respondent from gazetting members of the Hamisi CDF committee as currently constituted.
  - (d) An order of *mandamus* compelling the 1<sup>st</sup> respondent to repeat the nomination and/or election of persons to serve in the Hamisi CDF Committee specifically.
  - (e) An order of *mandamus* compelling the 1<sup>st</sup> respondent to repeat the nomination and/or election of persons to serve in the Hamisi CDF committee specifically for the representative of persons with disability in accordance with the Constitution,
  - (f) Any other relief that this court may deem fits and just to grant the petitioners.
- 3 Along with the petition, the petitioners also filed a notice of motion seeking conservatory orders staying the gazettment of nominated members of the Committee pending the hearing of the petition. When the matter came up for hearing on June 10, 2016, I considered the fact that under section 16(e) and 56(1) of the *Act*, any disputes concerning the administration of Act are to be forwarded to the Board for resolution in the first instance. I took the view that in light of the provisions of article 159(2)(c) of the *Constitution*, it is not inconsistent with the Bill of Rights to resolve matters even those involving fundamental rights through alternative dispute resolution where appropriate particularly where there is a statutory procedure provided. I therefore directed as follows;
  - (a) The National Government Constituencies Development Fund Board shall inquire into and establish whether the Hamisi National Government CDF Committee is properly constituted having regard to the inclusion of persons with disabilities in accordance with the *National Government Constituencies Development Fund Act, 2015*.
  - (b) The Board shall hear all parties including Oscar Buleemi who shall be served with these proceedings and shall proceed to make its findings thereon.
  - (c) A report of the findings shall be filed in this court within 45 days from the date hereof.
  - (d) This matter will be mentioned on July 20, 2016 for further orders and directions.
  - (e) The 1<sup>st</sup> respondent, Hamisi Constituency and the 2<sup>nd</sup> respondent, Honourable Charles Gimose are struck off from these proceedings.



- (f) The petition to the extent of any claim by the 4<sup>th</sup> petitioner, Joshua Nkomo is duly marked as withdrawn with no order as to costs.
- (g) Costs in the cause.
- 4 In accordance with the said direction, the Board investigated the matter and made its findings in the report dated September 6, 2016 filed in this court. The Board noted that at the meeting held on July 27, 2016 at the Deputy Commissioner’s Office, Hamisi, Mr Buleemi disclosed that he had tendered his resignation as a member of the Committee on July 25, 2009. The Board noted that vacancy had arisen in terms of section 43(10) of the Act and would be filled in accordance with the law and regulations. It could therefore not determine whether the said Mr Buleemi was a person with disabilities.
- 5 When the matter came up to day for consideration of the report and directions, Mr Yogo, counsel for the respondent submitted that the petition had been resolved and the matter should now be terminated as there was not further determination to be made as the subject of the petition Mr Buleemi had resigned. Mr Sore, counsel for the petitioners, was of the view that the issue of whether the Committee was lawfully constituted was still a live issue and the court should give its decision on it and on the manner in which the rights of persons with disabilities are dealt with by the Board.
- 6 In order to determine the issue whether the matter is settled it necessary to appreciate the substance of the petition. The gravamen of the petitioners’ case is at paragraph 19 where it is pleaded that, “Oscar Buleemi was nominated/selected to represent persons living with disability yet he is not a person living with disability.” Paragraphs 20, 21, 22, 23 and 24 all allege violation of the provisions of the Constitution dealing with rights of persons with disabilities namely; article 27 dealing with equality and discrimination, article 28 – right to human dignity, article 48 – right of access to justice and article 54 – rights of persons with disabilities. The petitioners also cited the provisions of the Convention on the Rights to Persons with Disabilities to support their case. It is also clear from the declarations sought that the petitioner’s case is focused on the rights of persons with disabilities and more specifically on representation of persons with disabilities on the Committee.
- 7 The petition does not implicate the nomination and/or election of the other members of the Committee otherwise they would have been joined to the proceedings or named. The petitioner would also have pleaded how their nomination/election to the Committee was contravention of the Constitution. I therefore find and hold that the petition dealt with the position of Oscar Buleemi who had since resigned. Since he has resigned, the position of persons with disabilities on the Committee is vacant. In the circumstances, the court cannot issue the prayers sought in the petition.
- 8 In light of what has transpired and to the protect the rights of persons with disabilities, the Board is reminded of its constitutional obligation to ensure that the rights of vulnerable persons are protected and promoted through development of relevant regulations and policies.
- 9 The petitioner is accordingly marked as settled with no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF OCTOBER 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Sore instructed by R. A. Onchuru & Company Advocates for the petitioners.

Mr Yogo instructed by Otieno, Yogo, Ojuro and Company Advocates for the 3<sup>rd</sup> Respondent.

