



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.11 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE WRIT OF
JUDICIAL REVIEW IN THE NATURE OF PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUENCIES DEVELOPMENT FUND ACT 2013

AND

**IN THE MATTER OF SECTION 24 OF THE CONSTITUENCIES DEVELOPMENT FUND ACT
2013**

BETWEEN

JUSTUS ONYANDO 1ST APPLICANT

PETER MOGENI OMANGA 2ND APPLICANT

VERSUS

THE HON. JOHN OROO OYIOKA 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

CONSTITUENCIES DEVELOPMENT BOARD 1ST INTERESTED PARTY

THE CONSTITUENCIES DEVELOPMENT

FUND COMMITTEE – BONCHARI 2ND INTERESTED PARTY

THE CABINET SECRETARY –

MINISTRY OF DEVOLUTION 3RD INTERESTED PARTY

RULING

1. By a Notice of Motion dated 26th October 2013 the applicants herein Justus Onyando and Peter

Mogeni Omanga are seeking the following orders:-

1. *That this application be certified urgent and be heard ex-parte on priority basis.*
2. *That leave be granted to the respondents to commence judicial review proceedings in the nature of prohibition to prohibit the 1st Respondent from calling for, holding, carrying out or undertaking the Bonchari Constituency Development Fund Committee Elections to choose, appoint or nominate officials of the committee envisaged under Section*

24 of the Constituencies Development Fund Act, 2013.

3. *That the leave so granted do operate as an order staying the calling for, holding, carrying out or undertaking the Bonchari Constituency Development Fund Committee elections to choose, appoint or nominate officials to the committee.*
4. *That the costs of this application do abide the outcome of the substantive application for the judicial review writ of prohibition.*
2. The application is based on the statement of grounds pursuant to **Order 53 Rule (2)** of the **Civil Procedure Rules** dated the 26th day of October 2013 and filed on the 28th day of October 2013 and a supporting affidavit by Justus Onyando sworn on the 30th day of October 2013 and filed in court on the same date.
3. According to the deponent he is a member of the Constituency Development Fund Committee (CDF) for Bonchari Constituency representing the interests of a community based organization called VISION HOPE SERVICE. He contends that the CDF Committee for Bonchari constituency was duly constituted and gazetted on the 4th day of June 2013 vide gazette notice No.84 as provided for under **Section 24** of the **Constituencies Development Fund Act** and it is shown as “**JO2 (b)**” being minutes of the meetings held. He further contends that once the CDF committee is duly constituted and gazetted it shall be in office for a period of 3 years and shall not become vacant until the expiry of that period.
4. He further states that he was surprised when he saw a notice dated 22nd October 2013 put up at Nyangena Primary School Notice Board by the 1st Respondent who is the area Member of Parliament for Bonchari Constituency which called for the holding of CDF committee elections on the 29th day of October 2013 for Bomorenda, Bogiakumu, Bomariba and Riana wards at various venues. The court is shown a copy of the said notice marked as “**JO3**”. He contends that no elections can be held when there is a duly constituted office and its members gazetted and that the person who was the area Member of the National Assembly Mr. Zebedeo Opopo who convened open public meetings that eventually led to the appointment of the current CDF Committee was replaced as member of parliament by the 1st respondent pursuant to a court order.
5. Further that the replacement of a member of parliament by another pursuant to a court order or by election does not affect the term, constitution and duties of a duly constituted and gazetted CDF Committee whose term of three (3) years has not expired and whose appointments are done through a procedure set out in the Act. He contends that the 1st respondent is acting illegally in contravention of the Constituencies Development Fund Act and without jurisdiction.
6. Finally that this court has supervisory powers to check the decisions and actions of State Officers who owe a public duty to citizens and therefore this application should be allowed.
7. In opposition to the application the 1st respondent filed a replying affidavit dated 4th day of December 2013 in which he states that he is the Member of the National Assembly for Bonchari Constituency, and that he has not flouted, contravened, traversed or in any way violated any such law as is being purported by the applicants. He contends that he has not issued any notice whatsoever calling for elections of the CDF committee on the 29th October 2013 or at all but that the alleged notice produced by the applicants is a forgery and a creation of the applicants as he is not its source. He deposes that if the alleged notice was issued by him as an official document then it should have an official authentication in the form of an official seal, his signature or that of an authorized officer from the Bonchari Constituency with a validation or authentication stamp feature that are glaringly lacking from the alleged notice.

8. He depones further that under the **Constituency Development Fund Act Section 24** (the Act), it is the responsibility of the Member of the National Assembly to call for elections of the CDF committee members and their subsequent nomination and/or appointment which role is not only limited to the calling of the election of the committee members but also to the appointment of the members from those elected. He contends further that being the validly elected Member of National Assembly for Bonchari Constituency he is legally mandated to initiate elections for the members of the CDF committee within 45 days of being sworn in pursuant to **Section 24 (3) (a)** and **24 (3) (c)** of the Act.
9. He contends that **Section 24 (5)** of the Act implies that the CDF committee shall be constituted after every Member of National Assembly election including a by-election as it states that the first meeting of the CDF committee shall be convened within the first sixty days of a new parliament or a by-election by the National Government Official at the constituency or in his or her absence, by an officer of the Board seconded to the constituency on such day as may be designated by the cabinet secretary. That this meeting could not be regarded as a first meeting if the tenure of the previous CDF committee is unaffected in the event of an election of the Member of the National Assembly or a by-election of the same position as the case may be.
10. He also avers that **Section 24 (10)** of the Act contemplates appointment of a new CDF committee in the event of an election of the Member of National Assembly or a by-election with respect to that position and that the funds account manager seconded by the Board to the constituency shall be the custodian of all records and equipment of the constituency during the term of parliament and during transitions occasioned by general elections or a by-election. He opines that from the above it is evident that the elections or by-elections of the Member of National Assembly have a direct impact on the life of an existing CDF Committee and that this position would bear if the tenure of an existing Member of National Assembly is affected by way of a court order nullifying such a member's election and declaring another person as validly elected as happened in the instant case. He stated in his affidavit that the applicants' reliance on **Section 24 (9)** is unfounded as this provision qualifies itself by further stating that the tenure of the CDF committee shall come to an end upon the appointment of a new CDF fund committee in the manner provided in the Act.
11. The deponent further states that since he is the patron of the constituency development fund for Bonchari Constituency it would be an injustice both to himself and the constituents of Bonchari if he were not allowed to appoint a new CDF committee and instead forced to work with that formed by a political rival as there was a high likelihood of insubordination, that it would also be discriminatory against him if he was denied the opportunity to perform statutory duties which other Members of the National Assembly have performed in their respective constituencies. He contends that the application lacks merit and should

therefore be dismissed with costs.

12. Parties agreed to canvass this application by way of skeleton submissions which were highlighted on the 13th February 2014.
13. Mr. Minda for the applicant in highlighting the applicants' submissions dated 12th February 2014 brought out the following points:-

a. Whether notice in issue was issued by 1st Respondent

14. On this point he submits that the fact that the 1st respondent is opposed to the application shows that he is well linked to the notice for if he was not he would have come to court at the very earliest opportunity and disowned the same. In the circumstances, 1st respondent should not be heard to be running away from the notice which he himself put up.

b. On Section 24 (3) and (9) of the CDF Act

15. He submits that **Section 24 (3)** prescribes a procedure for electing a CDF committee into office which comprises 8 persons with the managing director sitting as an ex-officio member. He adds that the procedure is meant to be undertaken within 45 days of the election of an MP into office

and that the said procedure cannot be undertaken at any other time.

16. That Section 24 (9) provides for the life of the committee which is a term of 3 years and that it is common ground between parties that the relevant committee was gazetted on 13th June 2013

c. Issue for determination

17. The issue for determination according to Mr. Minda is whether that committee as gazetted on the 13th August 2013 can be removed before expiry of 3 years. He submits that the answer is no by dint of **Section 24 (9)** irrespective of a parliamentary term. That in other words change in the term of MPs does not affect the committee's term.

18. Further that **Section 24 (9)** also provides the term of such committee which shall only come to an end upon appointment of another committee pursuant to **Section 24 (3)**. He prays for the orders sought with costs.

19. On the other hand Mr. Nyamweya for the 1st Respondent in highlighting the submissions opposing the application herein relied on the 1st respondent's replying affidavit as well as the affidavit sworn by Paul Mogire Sakawa and on the written submissions filed herewith.

20. He submits that the 1st respondent's opposition to the application does not necessarily mean he supports the alleged notice. He also says that the 1st respondent did not issue the alleged notice and that in the circumstances, there is no notice. He adds that judicial review is review of public administrative action and in the absence of the notice there is nothing to review and therefore the application does not have substance.

21. Further that the alleged notice is not prepared by 1st respondent though inscribed on 1st respondent's letter head and bears his name, the 1st respondent has not even signed it. It is his submission that any person could come up with such a notice purporting it to have been issued by the 1st Respondent and so the facts upon which this judicial review is based are untrue and therefore the court should not believe them.

22. As regards the interpretation of **Section 24 (3)** and **(9)** of the **Act** counsel submits that **Section 24 (3)** requires that within 45 day of an

MP being elected he/she must convene open public meetings for purposes of electing persons to be nominated into CDF committees. The key issue he submits is whether the 1st respondent was elected an MP for that constituency. He has shown that the court declared him MP for that constituency, and flowing from the said court order he was the elected Member of the National Assembly for Bonchari Constituency and after being sworn in by the Speaker of the National assembly, **Section 24 (3)** came into play.

23. He further submits that **Section 24 (9)** sets out the term of CDF committee and that there is a component of notification in **Section 24 (9)** that the term of office of CDF committee comes to an end upon appointment of another committee.

24. He says that it is the applicants' case that having been nominated under previous MP then the term stands. He submits that one must read **Section 24 (9)** together with **Section 24 (3)** and submits that election here also includes declaration. He submits that the word irrespective in **Section 24 (9)** does not entitle applicants to stay in office. That assuming that the committee remains in office for the 3 years a new committee will be elected but if term of parliament ends in 2017 the new committee will stay in office for transitional purposes and that is

where **Section 24 (3)** comes in.

25. Counsel also submits that the use of the word "**irrespective of a parliamentary term**" is to ensure that no vacuum is created as a new political term is unveiled.

26. He submits that he is not supporting the alleged notice but he is saying that the 1st respondent is entitled to issue a notice in order to comply with the mandatory obligations upon him/her. He urges the court to disallow the application and to uphold 1st respondent's entitlement to comply with **Section 24 (3)** of the **CDF Act** which entitlement is currently on hold.

27. In a rejoinder Mr. Minda submits that the court had been treated to a misinterpretation of Section 24 (9) of the CDF Act. He also submits that the legislators of the CDF Act were aware that the term of committee and term of parliament would never meet and hence the use of the word **“irrespective of the parliamentary term in Section 24 (9).”**
28. It is also Mr. Minda’s contention that the use of the words **“shall be renewable”** was deliberate since only what has come to an end can be renewed and lastly that the manner of appointment envisaged under the Act is in **Section 24 (3)** with the result that the current committee cannot be removed.
29. Mr. Nyamweya informed the court at the hearing of the petition that they had abandoned issue No. (c) set out on page 2 of their submissions. The foregoing issues largely formed the issues which were submitted upon by the parties to these proceedings.
30. I have considered the application herein together with the supporting affidavit and rival submissions. The first issue for determination concerns the competency of the application but since this issue has been abandoned, I make a finding that the application herein is properly before this court.
31. The only issue left for determination in this application is whether the 1st Respondent issued the impugned notice and if so, whether he did so in accordance with **Section 24** of the **Constituency Development Fund Act 2013**. However, before I determine the above issue, I will start by considering the nature and scope of judicial review. The Supreme Court Practice 1997 Vol. 53/1-14/6 states:-

“The remedy of judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The court will not however, on a judicial review application act as a “court of appeal” from the body concerned nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is “Wednesbury” unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by law, the court would under the guise of preventing the abuse of power be guilty itself of usurping power.”

32. From the above quote this court’s function is clear. It is to consider whether the 1st respondent issued a notice under the 1st respondent’s mandate as prescribed in the **CDF Act Section 24** and whether he did so within the law. It is not this court’s mandate to adjudicate on the merits or demerits of the issuance of the said notice.
33. The 1st respondent has denied issuing the alleged notice, although in the same breath he says that the law gives him the mandate to do so since he is (as at the time of the hearing of the application), the Member of the National Assembly for Bonchari Constituency. From the submissions on record, and having taken a close look at the alleged notice, I do not think that such a notice was issued by the 1st Respondent. The document is not signed nor does it bear the name of the **“AREA MP”** at the foot thereof for purposes of signature. As submitted by counsel for the 1st Respondent, this document could have been manufactured by anyone, especially in this era of computers.
34. Having reached the conclusion that the alleged notice was not issued by the 1st respondent, it follows that there is no complaint to warrant the granting of the orders sought by the applicants. If such orders were issued, the court would be **“acting in vain.”**
35. In the premises, I find no merit in the Notice of Motion dated 26th October 2013. The same is hereby dismissed in its entirety.
36. As to costs, each party shall bear its own costs.

37.Orders accordingly.

Dated, signed and delivered at Kisii this 5th day of June, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Minda (present) for Applicants

M/s Nyamweya Mamboleo (absent) for Respondents

Mr. Bibu - Court Assistant