



**Okello v Chairman NGCDF Kisumu East Constituency & 2 others (Appeal E044 of 2023) [2024] KEELRC 818 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 818 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E044 OF 2023**

**S RADIDO, J  
APRIL 17, 2024**

**BETWEEN**

**CHARLES OTIENO OKELLO ..... APPELLANT**

**AND**

**CHAIRMAN NGCDF KISUMU EAST CONSTITUENCY ..... 1<sup>ST</sup> RESPONDENT**

**FUND ACCOUNT MANAGER, NGCDF KISUMU EAST  
CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT**

**MEMBER OF THE NATIONAL ASSEMBLY KISUMU EAST  
CONSTITUENCY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal arising from the Ruling of Honourable M.I. Shimenga delivered on the 6<sup>th</sup> July 2023 in Kisumu ELRC No E070 of 2022, Charles Otieno v Chairman, NGCDF)*

**JUDGMENT**

1. Charles Otieno Okello (the Appellant) was appointed as a member of the National Government Constituency Development Fund, Kisumu East Constituency to represent persons living with a disability. With time, the Appellant was elected by his peers to chair the Monitoring and Evaluation Committee.
2. On a date which was not disclosed in the Memorandum of Claim, the Appellant contended that he was summarily dismissed from the chairship of the Committee and that he was side-lined from the activities of the Fund.
3. On or around 25 April 2022, the Appellant sued the Chairman, National Government Constituency Development Fund, Kisumu East Constituency, the Fund Account Manager, National Government Constituency Development Fund, and the Member of the National Assembly, Kisumu East Constituency seeking orders:



- i. An order do issue directing the Respondents to reinstate the Claimant to his position in the National Government Constituency Development Fund, Kisumu East.
  - ii. An order do issue directing the Respondents to pay to the Claimant the amounts lost as wages, allowances and benefits as a result of his summary dismissal.
  - iii. Costs and interest of the suit.
  - iv. Any other relief the Honourable Court deems fit and just.
4. When served, the Respondents raised Notices of Preliminary Objection contending:
- TAKE NOTICE that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall raise a Preliminary Objection before the hearing of this suit that the suit offends the provision of section 56 of the National Government Constituency Development Fund Act and the same ought to be struck out with costs.
5. The Senior Resident Magistrate rendered herself on the objection by upholding the Objection on the ground of lack of first instance jurisdiction. The Cause was struck out.
6. The striking out prompted the Appellant to lodge a Memorandum of Appeal with this Court on 3 August 2023, contending:
- i. THAT the Learned Trial Magistrate erred in law and in fact in failing to consider, apply and distinguish case law which are binding upon the Court hence arrived at the wrong decision.
  - ii. THAT the Honourable Trial Magistrate did not deal with all the Issues conclusively since this is an employment matter.
  - iii. THAT the Learned Trial Magistrate erred in law and fact by allowing the Preliminary Objection raised by the Respondent when the ingredients of Preliminary Objection had not been met.
  - iv. THAT the Learned Magistrate erred in law and fact by ruling that the Appellant should have exhausted internal mechanism first before going to Court of which there was nothing to exhaust.
  - v. THAT the Learned Magistrate did not appreciate the overwhelming evidence tendered to Court by the Appellant.
  - vi. THAT the Ruling was against the weight of evidence produced in Court by the Appellant.
  - vii. THAT the Learned Magistrate was completely biased to the Appellant.
7. The Record of Appeal was filed on 16 February 2024, and the Court gave directions on 26 February 2024. The Appellant filed his submissions on 19 March 2024.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions on 13 March 2024.
9. The Court has considered the Record of Appeal and submissions.

### **Role of the Court in First Appeal**

10. The role of a first appellate Court on appeal was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:



this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

11. This Court will bear in mind the interdict on its role.

### **Alternative dispute resolution avenues**

12. The Senior Resident Magistrate struck out the Cause on the ground that the Appellant had not exhausted the alternative dispute resolution avenue outlined in section 56 of the National Government Constituency Development Fund Act.

13. Before this Court, the Appellant has taken a three-pronged attack against the Ruling.

14. First that the Preliminary Objection did not fit the test for a pure point of law as it required the ascertainment of facts since the Respondents had denied in their Response some of the facts asserted by the Appellant; second that the Constituency Development Fund Act, 2013 relied on the Senior Resident Magistrate had been declared illegal by the Supreme Court in *Institute for Social Accountability & Ar v National Assembly & 3 Ors and 5 Ors (2022) KESC 39 (KLR)*, and that the Senior Resident Magistrate had relied on an illegal law to decline jurisdiction and struck out the Cause and that the Appellant was protected by the *Employment Act* from unfair termination of employment and not through the administration of the Constituency Development Fund Act.

15. The Respondents maintained that the Senior Resident Magistrate was right to decline jurisdiction on the basis of section 56 of the National Government Constituency Development Fund Act.

16. Section 56 of the Act provides:

#### 56. 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.

17. Two questions emerge from the interpretation and application of the aforesaid provision. One, whether an allegation of unfair termination of employment by an employee of the Fund is a complaint or dispute arising from the administration of the Act, and two, whether such a dispute is one of a civil nature warranting referral to the Fund Board in the first instance.

18. Section 22 of the Act contemplates the Board appointing staff on such terms and conditions of service as it may determine.

19. In this Court's view, when a dispute arises about the terms and conditions of service between the Fund and its staff or employees, the dispute does not arise from the administration of the Act.

20. It is the terms and conditions of the contract of employment and the general law of employment, the *Employment Act* which ought to be invoked.



21. Looking at the Act as a whole, it seems to this Court that the complaints and disputes envisaged by section 56 of the Act are those that arise from project implementation/tendering between the Board or various constituency committees and entities or persons who participated in the project implementation or tendering.
22. It is such project contractual disputes that may take a civil nature.
23. On the question of the illegality of the Act, the Court notes that the Act that was under challenge was the 2013 Act and not the 2015 Act which the Senior Resident Magistrate relied on.
24. Without a direct challenge to the constitutionality of the 2015 Act and a clear determination thereof, this Court is not ready to assign the declaration of unconstitutionality of the 2013 Act to the 2015 Act.
25. The Court concludes that the Senior Resident Magistrate fell into error of law in declining jurisdiction on the basis of section 56 of the National Government Constituency Development Fund Act.
26. Before final disposition, the Court must make it clear that allowing this Appeal does not mean that there was an employer/employee relationship between the Appellant and the Respondents. A determination on this issue will have to be made before the trial Court.

### **Conclusion and Orders**

27. In light of the above, the Court vacates and sets aside the Ruling of the Senior Resident Magistrate and orders that the Cause be placed before a Magistrates Court with jurisdiction for further proceedings.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 17<sup>TH</sup> DAY OF APRIL 2024.

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Appellant Mwamu & Co. Advocates

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents Otieno, Yogo, Ojuro & Co. Advocates

For 3<sup>rd</sup> Respondent L.G. Menezes & Co. Advocates

Court Assistant Chemwolo

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