



**Otieno (Suing on his Behalf and on Behalf of the General Public) v  
National Government Constituency Development Fund Board & another;  
Ethics and Anti-Corruption Commission (Interested Party) (Petition  
E097 of 2024) [2024] KEELRC 13499 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13499 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E097 OF 2024**

**B ONGAYA, J**

**DECEMBER 19, 2024**

**IN THE MATTER OF ARTICLE 1, 2(1), 10, 19(1), 20, 21(1), 22(1),  
23(1), 47, 77,165,232 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE PUBLIC OFFICERS ETHICS ACT NO. 4 OF 2003 AND  
THE PUBLIC SERVICES (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015**

**AND**

**IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT NO 18 OF 2014**

**AND**

**IN THE MATTER OF PUBLIC OFFICER ETHIC ACT, NO 4 OF 2003**

**AND**

**IN THE MATTER OF THE DOCTRINES OF LEGITIMATE EXPECTATION**

**BETWEEN**

**EZEKIEL OTIENO (SUIING ON HIS BEHALF AND ON BEHALF OF THE  
GENERAL PUBLIC) ..... PETITIONER**

**AND**

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND  
BOARD ..... 1<sup>ST</sup> RESPONDENT**

**YUSUF MBUNO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**



## JUDGMENT

1. The petitioner filed the petition dated 21.06.2024 through Mwangi & Ngatia Advocates. The petitioner prayed for:
  - a. A declaration that the 2<sup>nd</sup> respondent's impugned decision to handpick and appoint the fund managers contrary to the law, which requires that public office be filled through a transparent, competitive, inclusive, and merit based recruitment process open to public participation was irregular, unlawful and unconstitutional and therefore invalid, null and void ab initio.
  - b. The Honourable Court be pleased to issue an order that the 2<sup>nd</sup> respondent exit the office due to incompetence.
  - c. The Honourable Court be pleased to issue an order of mandamus compelling national NG-CDF to publish all constituencies that do not have fund managers.
  - d. The Honourable Court be pleased to issue an order compelling all fund managers that have been holding substantive and acting in more than one constituency to return all the salaries they have been acquiring from the acting constituents.
  - e. An order do issue that the 2<sup>nd</sup> respondent be surcharged for public expenditure arising out of the irregular appointment of the fund managers.
  - f. An order quashing the fund managers' appointments in Embakasi South, Makadara, Mathare, Kasipul Kabondo, Teso South, Budalangi, Kimilili constituencies among many others.
  - g. A declaration that the respondents have grossly violated *the Constitution*.
  - h. That in the alternative the Court do issue an order that the respondent do ensure that all monies irregularly and unlawfully spent on the irregular appointment are recovered from the relevant persons.
  - i. Costs of this suit
  - j. Any other relief the Honourable Court may deem just to grant.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 21.06.2024. The petitioner's case is as follows:
  - a. That he is an adult Kenyan citizen carrying out social advocacy under the banner of Social Public Interest Initiative.
  - b. That he has received credible information relating to unlawful and irregular appointment of fund managers by the 2<sup>nd</sup> respondent in Embakasi South, Makadara, Mathare, Kasipul Kabondo, Teso South, Budalangi, Kimilili among others.
  - c. That they were appointed contrary to the law which requires that public office be filled through a transparent, competitive, inclusive, and merit based recruitment process open to public participation.
  - d. That the staff recruitment was discriminatory and prejudicial to members of the public. The petitioner further states that the said irregular appointment of fund managers gave an unfair advantage to the staff who were recruited without following the due process of the law.



- e. That the 2<sup>nd</sup> respondent has failed to recruit fund account managers of various constituencies for a long time hence the lagging behind of some constituencies in terms of development.
  - f. The 2<sup>nd</sup> respondent has caused and may continue to cause unnecessary and wasteful use of public expenditure since they continue to allow certain fund managers not to perform to the required expectation, leading to corruption in such constituencies hence no value for money.
  - g. That the appointment should be competitive. The recruitment process should involve a careful preparation of a job description and job requirements, which include job and person specification. The short listing and interview process should be transparent based on a verifiable recruitment procedure. The 2<sup>nd</sup> respondent improperly exercised the public power conferred on him and has thereby abused the office.
3. The interested party filed Grounds of Opposition dated 18.07.2024 through Mercy Biwott and opposed the petition on the following grounds:
- a. By virtue of Article 79 of *the Constitution* of Kenya 2010, the *Anti-corruption and Economic Crimes Act*, 2003 and the *Ethics and Anti-Corruption Commission Act*, 2011, the interested party is mandated to investigate corruption, economic crimes and unethical conduct.
  - b. The petitioner has not demonstrated to this court that prior to the filing of the application and petition, the interested party has without any proper or justifiable reason failed or refused to investigate the allegations in the petition.
  - c. The petitioner is using the Honourable Court as the first port of call without approaching and using the available avenues exhaustively to address the allegations of corruption as raised in the petition in the first instance.
  - d. The petitioner has not presented factual or substantial claim, controversy or dispute that has arisen between himself and the interested party which calls for adjudication before the Honourable Court.
  - e. Similarly, no acts or omissions attributed to the interested party, has been disclosed by the petitioner, which are in violation or are likely to be in violation of any part of *the constitution*.
  - f. Nevertheless, the interested party through this petition has now been made aware of the allegations of corruption and unethical conduct on the part of the respondents and the report has now been registered awaiting further internal processes.
  - g. The petition is therefore premature and the orders sought are untenable and constitute an abuse of court process.
4. The 1<sup>st</sup> respondent filed the replying affidavit of CS/CPA Simon Ndweka, the Corporation Secretary of the 1<sup>st</sup> respondent, sworn on 25.09.2024. It was stated and urged as follows:
- a. That in the performance of its function, the board is mandated under section 22 of the Act to appoint such officers as are necessary for the proper management of the fund and discharge of its function upon such terms and conditions of service, as it may determine.
  - b. To ensure efficient utilization of the funds and to enhance the performance of its activities, the board collaborates with the National Government Constituency Development Fund Committees established pursuant to section 43(1) of the Act.



- c. The Fund Account Manager is an officer of the board seconded to the Constituency Committee and becomes a member by dint of section 43(2)(f) of the Act.
  - d. That a Fund Account Manager is by virtue of section 43(6) and (9) of the Act responsible for convening the Constituency Committee Meetings, albeit only in the absence of the national government official, within 60 days from the date of commencement of the new Parliament and to be the custodian of all records and equipment of the constituency.
  - e. Unlike other Constituency Committee Members whose terms come to an end at the lapse of two years but are amenable to renewal, a Fund Account Manager, is a permanent staff of the board and available for secondment to the newly constituted Constituency Committees and by extension acts as a liaison between the outgoing Committee and incoming Committee.
  - f. Neither the Act nor the regulations provide for the appointment and recruitment of the Fund Account Manager whereof such employees are contemplated to be staff of the board pursuant to section 22 of the Act and are employed pursuant to the Human Resource Policy of the board which has incorporated the principles set out under chapter 6 of *the Constitution* of Kenya, the Public Officers Ethics Act and the *Leadership and Integrity Act*.
  - g. By dint of regulation 5(2)(a) of the regulation, the Constituency Committee's term lapses at the commencement of the new Parliamentary term at which time, the Fund Account Managers by dint of section 43(9) of the Act remains the custodian of all the records and equipment of the constituency during the term of the Parliament and during transition occasioned by general elections or by- election.
  - h. It is the respondents' case that the only vacancy contemplated to exist at the commencement of the new Parliament are the positions contemplated under sections 43(2)(b), (c), (d) and (e) of the Act and not the Fund Account Managers wherefore the allegation of the petitioner that the 1<sup>st</sup> respondent has failed to appoint Fund Account Managers and thereby curtailing the operations of the constituency committees is unmerited, unsubstantiated and borne of innuendos.
  - i. The applicant has not demonstrated prima facie the efforts taken to procure the list for the Fund Account Managers from the board despite the same being a public document and even if he did so and was ignored, the applicant had the first recourse under section 14 of the *Access to Information Act* to review the board's decision before invoking the Court's jurisdiction wherefore the application is premature and offends the provisions of section 9 of the *Fair Administrative Action Act*.
  - j. It would be prejudicial to dismiss the Fund Managers without according them the rights conferred to them in the *Employment Act*.
  - k. The 1<sup>st</sup> respondent is the only body empowered by statute to employ fund Account Managers and there is in place a Human Resource Policy Manual that dictates how it does its employment. It will therefore be usurpation of powers for the Honourable Court to issue an order directing the 1<sup>st</sup> respondent's Chief Executive Officer to make such employment at the whim of the petitioner.
5. The 2<sup>nd</sup> respondent filed the replying affidavit of Yusuf Mbuno, the Chief Executive officer of the 1<sup>st</sup> respondent, sworn on 25.09.2024. It was stated and urged as follows:



- a. That the 2<sup>nd</sup> respondent's functions are subject to the directions of the board and concern the day to day management of the affairs of the board and its staff.
  - b. The board is empowered by dint of section 21 of the Act to appoint staff and among such staff is the Fund Account Manager who by dint of section 22(2) of the Act is the administrative reporting officer of the National Government Constituency Development Fund Committee which is created in each constituency pursuant to section 43 of the Act.
  - c. That contrary to the averments under paragraph 15 of the petition and 5 of the affidavit in support thereof, the appointment of a staff of the board is a preserve of the board.
  - d. Fund Account Managers are permanent employees of the 1<sup>st</sup> respondent and when a vacancy arises they are replaced in accordance with the 1<sup>st</sup> respondent human resource practices.
  - e. This court lacks jurisdiction to entertain the petitioner's call for the termination of the 2<sup>nd</sup> respondent's employment.
  - f. That the petitioner has prematurely invoked the jurisdiction of the court, contrary to section 19 of the Act and sections 8 and 9 of the Fair Administrative Actions Act.
  - g. The petition is lacking in precision as it neither states exactly what provisions of *the constitution* are alleged to have been violated nor does it disclose the manner in which the said provisions have been violated by the 2<sup>nd</sup> respondent or other parties. It is largely based on hearsay and rumours wherein the petitioner alludes to the actions of ghosts whose description or identity has not been disclosed.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
7. First, the petition is found premature as urged and submitted for the respondents and interested parties. As far as the 2<sup>nd</sup> respondent is alleged to have breached the public officer code of ethics and conduct, the primary authority to receive such report and to handle the matter in accordance with the prescribed disciplinary process is the public officer's employer or responsible commission under the *Public Officer Ethics Act*, 2003. Sections 35 and 36 of the Act provide as follows:

“35.

- (1) The responsible Commission for a public officer may investigate to determine whether the public officer has contravened the Code of Conduct and Ethics.
- (2) An investigation may be made on the Commission's own initiative or pursuant to a complaint by any person.
- (3) The Commission may refer a matter to another appropriate body for investigation and that body shall investigate the matter within a reasonable time and submit a report to the Commission on its findings. (4) An investigation may be conducted even if the subject of the investigation has ceased to be a public officer.

36.

- (1) If an investigation discloses that the public officer has contravened the Code of Conduct and Ethics, the responsible Commission shall, within the time period prescribed by subsection (2)-



- (a) take the appropriate disciplinary action; or, (b) if the responsible Commission does not have the power to take the appropriate disciplinary action, refer the matter to a body or person who does have that power.
- (2) The time period referred to in subsection (1) is-
- (a) within thirty days after the completion of the investigation; or,
- (b) if another body investigated the matter under section 35 (3), within thirty days after the responsible Commission receives the report of that body.
- (3) The responsible Commission shall inform the public officer concerned of any action it takes or intends to take under subsection (1) either before it takes the action or within thirty days after it does so.
- (4) Subsection (3) does not affect any legal requirement to inform a public officer earlier than is required under that subsection.
- (5) The regulations made under section 42 may govern what disciplinary action is appropriate for the purposes of subsection (1).”
8. The interested party is one such agency that is vested with the investigative authority and the submission urged that by the instant petition to will take necessary investigations within the constitutional and statutory powers of the interested party appears valid. Meantime, the petition will fail as premature or for want of exhaustion of the prescribed statutory procedures.
9. Second, the petitioner has not shown that it requested for information and it was denied. The compelling order to produce information will not issue unless it is shown that the same was requested for and there was neglect, refusal or denial in that respect. The submissions for the respondents and interested party are upheld in that regard.
10. Third, the petitioner’s allegations have remained vacuous without provision of the required evidence to establish the allegations. The Court finds that the petition amounted to empty allegations not supported with due evidence. The petitioner alleges he had credible information whose source he did not disclose and which he did not corroborate with relevant documents. The petition must fail for want of due evidence.
11. Fourth, as urged for the respondents and the interested party, the petition will fail together with the reliefs sought because the contravention of the constitutional provisions as was alleged has not been established at all. The petitioner will pay costs of the petition.

In conclusion, the petition is hereby dismissed with orders the petitioner to pay the costs of the petition for the respondents and the interested party.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19<sup>TH</sup> DECEMBER, 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

