



**Ojuka v Chairman of CDF (Kisumu East (Appeal E062 of 2023)  
[2024] KEELRC 13323 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13323 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E062 OF 2023  
JK GAKERI, J  
DECEMBER 4, 2024**

**BETWEEN**

**BENARD OUMA OJUKA ..... APPLICANT**

**AND**

**CHAIRMAN OF CDF (KISUMU EAST ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Ruling of Hon. E. A. Obina SPM delivered on 17<sup>th</sup> October, 2023 in MCELRC No. E030 of 2022 Benard Ouma Ojuka V The Chairman N.G.C.D.F., Kisumu East Constituency and 2 others.
2. As a background, the Claimant initiated the claim dated 17<sup>th</sup> February, 2021 seeking various Orders including reinstatement to the position in the National Government Development Fund Committee Kisumu East, wages lost as a result of summary dismissal and costs.
3. The Claimant's case was that he was a representative of the National Government Constituency Development Fund National Board (NGCDFD) to the National Government Constituency Fund Committee, Kisumu East, 2017 to 2019 and continued serving with permission of the NGCDFNB and served diligently as a member of the N.G.C.D.F Committee.
4. He argued that although the N.G.C.D.F. National Board recommended his reinstatement, the Kisumu East CDF Committee declined to allow him to attend meetings which precipitated the suit.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the claim and challenged the Claimant to prove his employment by the Respondents arguing that he was once a co-opted members of the Kisumu East NGCDF Board for 2 years, not an employee.



6. The Respondents raised a Preliminary Objection dated 25<sup>th</sup> April, 2023 that the Court lacked jurisdiction to entertain the suit by virtue of Section 56 of the National Government Constituency Development Fund Act and sought its being struck out.
7. Similarly, a Notice of Preliminary Objection dated 6<sup>th</sup> July, 2022 the 3<sup>rd</sup> Respondent contended that the Claimant had no locus to institute the suit against the 3<sup>rd</sup> Respondent.
8. The Claimant 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents filed submissions on the Preliminary Objection.
9. From the record, the Court considered the Preliminary Objection dated 25<sup>th</sup> April, 2023, and delivered a Ruling on 17<sup>th</sup> October, 2023 holding that it had no jurisdiction and struck out the suit with costs to the Respondents.
10. This is the Ruling appealed against.
11. The learned trial Magistrate is faulted on various grounds.
  1. That the Court erred in law and fact by incorrectly applying the doctrine of exhaustion under Article 159 of *the Constitution* of Kenya and Section 56 of the NGCDF Act and made an erroneous finding.
  2. The Court erred in law and fact by not finding that the Appellant had embraced and implemented ADR before approaching the Court.
  3. The Court failed to consider submissions and arguments of counsel for the appellant and case law cited as binding precedents and arrived at a wrong decision.
  4. The Court incorrectly applied the doctrine of exhaustion as the Appellant had attended negotiation meetings so as to resolve the dispute amicably but the same fell through.
  5. The Court erred in law and fact by dismissing the appellants strong and powerful claim without justification or reasonable cause.
  6. The Court failed to appreciate that it had jurisdiction to hear and determine employment and labour related disputes under *the Constitution* of Kenya and Section 12 of the *Employment and Labour Relations Court Act*.
  7. The trial Court was biased, ignored solid evidence and the decision was against the weight of the evidence.

### **Appellant's Submissions**

12. On whether the Court based its decision on the evidence before it, Counsel submitted that the Preliminary Objection before the Court did not match the definition of a Preliminary Objection (herein after Preliminary Objection) in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distribution Ltd [1969] EA 696*.
13. Reliance was also made on the sentiments of the Court in *Mwanarusi Salim Matata V roman Nzioka Itatu & 7 Others [2021]*.
14. As to whether the trial Court had jurisdiction, Counsel relied on the Supreme Court decision in *Samuel Kamau Macharia & Another V Kenya Commercial Bank & 2 Others [2012]* on the source of a Courts jurisdiction to argue that since the Appellant's employment had been terminated, there was nothing to exhaust under Section 56 of the NGCDF Act.



15. Relatedly, Counsel submitted that the CDF Act 2013 was declared unconstitutional by the Supreme Court in *Institute of Social Accountability & Another V National Assembly & 3 Others* [2022] KESC 39 (KLR) and thus illegal and cannot be relied upon to dismiss a party's case.
16. Counsel, further argued that a Preliminary Objection could not be based on an illegal Act of Parliament citing the South African decision in *Schierhout V Minister of Justice* [1926] AD. 109 and the Court of Appeal decision *Mapis Investment (K) Ltd Kenya Railways Corporation* [2005] 2 KLR 410 that an illegality is unenforceable *ex turpi causa non oritur action*, to urge that the appellant's employment was protected by the provisions of the *Employment Act*.
17. Counsel urged that the disputes contemplated under Section 56 of the CDF Act relate to the administration of the Act and the dispute in Court did not relate to the administration of the CDF Act and the Court had the requisite jurisdiction citing the decision in *Daniel N. Mugendi V Kenyatta University & 3 Others* [2013] eKLR and *Public Service Commission & 4 Others Cheruiyot & 32 Others* [2022] eKLR among Others.
18. Counsel urges that the Respondent should bear costs of the appeal and the lower Court.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent Submissions**

19. As to whether the Court erred in dismissing the claim, counsel submitted that the Court had no jurisdiction as Section 56 of the NGCDDF Act provides for an internal dispute resolution mechanism before a Court's jurisdiction could be invoked and cited the sentiments of the Court in *Alibea Services Ltd V National Government Constituency Development Fund Board & Another and Interested Party* [2022] KHC 10922 (KLR) where the Court emphasized on Section 56(3) of the Act.
20. Reliance was also made on the Court of Appeal decision in *Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others* [2015] eKLR on the need to exhaust other mechanisms before invoking the Court's jurisdiction, to argue that the appellant had by passed the Board and the Court made the right decision.
21. As to whether the Appellant has made a case for the Courts interference with the findings of the trial court, counsel submitted that he had not and the Appellants construction of the Supreme Court decision in *Institute of Social Accountability & Another* case (Supra) was misleading and incomplete.
22. Counsel urges that the Supreme Court declared the CDF Act, 2013 unconstitutional but made no finding against the NGCDF Act which is operational to date.
23. Being a first appeal, the duty of the Court is to reevaluate and assess the evidence before the Court and arrive its own conclusions bearing in mind that it neither heard nor saw the witnesses as aptly captured by the Court of Appeal in *Selle V Associated Motor Boat Co. Ltd* [1968] EA 123 among other decisions.
24. However, in this case the appeal relates to a Preliminary Objection on the Court's jurisdiction and the matter had not been heard.
25. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Preliminary Objection dated 25<sup>th</sup> April, 2023 relied squarely on the provisions of Section 56 of the NGCDF Act to argue that the Court had no jurisdiction and the Court agreed and struck out the suit.



26. From the Ruling, it is clear that the Court considered one of the Preliminary objection only and thus did not consider the one filed by the 3<sup>rd</sup> Respondent on privity of contract which in the Courts view requires an evaluation of facts of the case to make such a determination.
27. Whether or not there is a contractual relationship between parties is both a factual and legal question and not a pure point of law as envisioned in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (Supra)* where Sire Charles Newbold P. stated:
- 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...”
- Law J. A was emphatic that
- ...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...”
28. The learned Judge proceeded to give examples of Preliminary Objections such as limitation of actions and reference to arbitration where the contract between the parties so provides.
29. To determine whether there is privity of contract between parties is a question principally to be ascertained by adduction of evidence to establish the nature of the relationship.
30. In the Court’s view it is not a pure point of law to qualify as a Preliminary Objection.
31. It is not on contest that the appellant was a co-opted member of the Kisumu East Constituency Development Fund Committee, initially for 2 years, 2017 to 2019, as records reveal that a request for his replacement was made on 6<sup>th</sup> January, 2021 on the ground that the panel had submitted the name of another nominee and the appellant had served 2 terms of 3 years and disharmony occasioned by the appellant’s complaint to the Board.
32. That the NGCDF Board had already approved the appellant’s co-option on 8<sup>th</sup> August, 2020 and was in the process of issuing a letter to him.
33. The NG-CDF Board letter dated 5<sup>th</sup> August, 2021 to the appellant’s lawyers is clear that the appellant had filed formal complaints with the Board and it agreed with him that he had a legitimate complaint about the manner in which affairs of the committee were being conducted and his exclusion yet he was a recognized co-opted member.
34. The Board was satisfied that the Appellant could only be removed with reasons under Section 43 of the NG-CDF Act and the request for the appellants replacement was unprocedural.
35. During the hearing at the NG-CDF Board, it emerged that the appellant could not continue serving as a co-opted member of the Kisumu East Constituency Development Fund Committee as he feared for his life, frustration and strained working relationship and his relationship with the office was irreconcilable.
36. Puzzlingly, the Board gave the NGCDF leeway to remove the appellant from his position procedurally and his complaint remained unresolved.
37. I have detailed the foregoing history to contextualize the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s Preliminary Objection.



38. It is common ground that the jurisdiction of the Magistrates Court to hear and determine employment disputes is traceable to Gazette Notice No. 6024 of 2018 published on 22<sup>nd</sup> June, 2018.
39. As correctly submitted by Counsels a Court derives its jurisdiction flows from *the Constitution* or Act of Parliament or both as held by the Supreme Court in Samuel Kamau Machari & Another V KCB & Others (Supra).
40. The jurisdiction of this Court to hear and determine this appeal is not contested.
41. The more pertinent question is whether the learned trial Magistrate had jurisdiction to hear and determine the appellants case or did the learned Magistrate misapply the exhaustion doctrine or misapprehended evidence or failed to consider the submissions by counsel or was biased as alleged.
42. The trial Magistrate found that he had no jurisdiction on account of the provisions of Section 56(3) of the NG-CDF Act.
43. Section 56 of the Act entitled Dispute Resolution provides -
  - (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) ...
  - (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.
44. Notably, the provisions of Section 56 of the NGCDF Act are couched in mandatory terms as exemplified by the term “shall” which means “has duty to” or mandatory. Blacks Law Dictionary, 10<sup>th</sup> Edition defines a dispute as a conflict or controversy.
45. Finally, a complaint is “an act or the action of complaining” which is an expression of dissatisfaction or annoyance.
46. Clearly, any dissatisfaction, annoyance, controversy or conflict arising out of administration of the NGCDF Act must first be made to the Board and arbitration could be resorted to where necessary.

**Did the appellant invoke the prescribed internal dispute resolution mechanism?**

47. From the evidence availed by the appellant and which has not been controverted, the Court is persuaded that the appellant embraced and invoked the internally prescribed method of dispute resolution and the NG-CDF Board heard him but offered no solution to his complain otherwise than his “procedural” removal from office owing to the irreconcilable differences and fear for his life among others.



### **What other options were available to the appellant?**

48. It would be unfair to argue that the appellant ought to have invoked the arbitral process as the Board did not recommend the process. Perhaps because the dispute was not amenable to arbitration.
49. As to whether the NG-CDF Act was declared unconstitutional the judgment of the Supreme Court is clear that it is the Constituency Development Fund Act 2013 that was declared unconstitutional as opposed to the National Government Constituencies Development Fund, 2016 (NG-CDF Act) Cap 414A. This Act did not repeal the CDF Act.
50. Contrary to the appellant's submission that the provisions of Section 56 of the NGCDF Act did not apply to his engagement, they did.
51. In Courts view since the provision uses the phrase "administration of this act" and Blacks Law Dictionary 10 Edition defines administration as "the management or performance of the executive duties of a government institution or business collectively all the actions that are involved in managing the work of an organization.
52. No evidence has been tendered to show that the NGCDF Act is also unconstitutional as of today.
53. Section 16 of the Act provides that;
  - The functions of the Board shall be to
    - a. ...
    - b. ...
    - c. ...
    - d. ...
    - e. receive and address complaints that may arise from the implementation of the Act.
54. Contrary to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions, the appellant did not by-pass the Board, he lodged a complaint before it and it gave a decision directed at the committee not the appellant.
55. The Board was, in other words was telling the Claimant that there was nothing it could do to save his position and gave the NGCDF Committee liberty to replace him, thus leaving the appellant's complaint on his exclusion from membership of the committee and denial of allowances unremedied, and was thus justified to invoke the jurisdiction of the Magistrates Court as he did.
56. From the foregoing the Court finds that trial Court erred in law and fact by failing to recognize and appreciate that the appellant lodged his complaint and dispute with the board in two letters which the Board acted upon and called him and the committee to present their respective cases and made a decision on the way forward.
57. Respectfully, the Ruling makes no reference to what the Appellant did not do or ought to have done having gone through the Boards processes and leaving empty-handed.
58. Thus, in the Courts view, the doctrine of exhaustion was incorrectly applied in the circumstances of this case as the Court had jurisdiction to hear and determine the suit before it based on the totality of the evidence on the appellant, having invoked and actively participated in the internal dispute resolution mechanism.



59. Although the appellant's counsel assailed the trial Court's ruling on the ground that the Court was biased in its decision making, no scintilla of evidence was adduced or availed to prove bias or want of impartiality.
60. This Court is alive to the fact that it can only interfere with the exercise of discretion by the trial Court if satisfied that the requisite threshold has been attained as held in *Mbogo V Shah & Another* [1968] EA 93 and echoed by Madan JA (as he then was) in *United India Insurance Co. Ltd V East Africa Underwriters (Kenya) Ltd* [1985] KLR 898 as follows:
- The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly that he failed to take account considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one is plainly wrong".
61. In the instant case the trial Court failed to consider the fact that the appellant had invoked the internal process by writing to the Board and was invited and heard by the Board, though his dispute remained unresolved.
62. In the upshot, the Court is satisfied that the appellant has made a sustainable case to justify interference with the Ruling delivered on 17<sup>th</sup> October, 2023.
63. Consequently, the appellants appeal is allowed and the Ruling by the trial Court dated October 17, 2023 is set aside in its entirety and direct that the suit be heard by a Magistrate other than E.A. Obina SPM.
64. Bearing in mind that the suit is yet to be heard, I propose that each party bears its own costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

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**JUDGE**



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