



REPUBLIC OF KENYA



Wanyama & 4 others v Lugari National Constituency Development Fund Committee & another (Cause E001 of 2023) [2023] KEELRC 3480 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 3480 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E001 OF 2023
JW KELI, J
OCTOBER 13, 2023**

BETWEEN

**WILLIAM OUMA WANYAMA 1ST CLAIMANT
WILSON ONDEGO INJERA 2ND CLAIMANT
VIOLET JENDEKA KARANI 3RD CLAIMANT
NZIDIAK MOUREEN MUSUMBA 4TH CLAIMANT
CATHERINE MWENESI KILWAKE 5TH CLAIMANT**

AND

**LUGARI NATIONAL CONSTITUENCY DEVELOPMENT FUND
COMMITTEE 1ST RESPONDENT
PEREZ ANYANGO 2ND RESPONDENT**

RULING

(On the Notice of Preliminary Objection dated 20th July 2023 by the Respondents)

1. The ruling is on the Notice of Preliminary Objection dated 20th July 2023 by the Respondents seeking the orders :-
 - a. That the suit herein has been instituted in contravention of the mandatory provisions of Sections 13 and 13A of the *Government Proceedings Act* as no written notice was served upon the Hon. Attorney General and the Respondents before institution of the present suit as required by law.
 - b. That the suit as drawn and filed contravenes the mandatory provisions of Article 156(4) (b) of the *Constitution* of Kenya, Section 12(1) of the *Government Proceedings Act* and Order 1 Rule



11 of the civil procedure Rules as the same has not been instituted against the Hon. Attorney General of the Republic of Kenya as required by the law.

- c. That the suit has been instituted against a non-existent entity incapable of being sued under the law.

Written submissions

2. The court on 24th July 2023 directed that the Preliminary Objection be canvassed by way of written submissions. The parties complied. The Respondents' written submissions dated 16th August 2023 were filed by Okelo Ochiel & Co. Advocates on even date. The Claimant's written submissions dated 3rd October 2023 were filed by Akolo Wanyanga & Company Advocates on the 4th July 2023.

Respondents' submissions.

3. It is submitted for the Respondents' that the Claimant's claim filed on 5th May 2023 against them, contravenes Section 13 and 13A of the Government Proceedings Act; Article 156(4) (b) of the Constitution of Kenya and Order 1 rule 11 of the Civil Procedure Rules.
4. The Respondents argue that the Claimants' claim in contravention of Section 13A of the Government Proceedings Act(GPA) was filed without the mandatory 30 days' notice of intention to institute proceedings been served upon the Hon . Attorney General; and pursuant to section 12(1) of GPA, the Claimants' failed to institute the claim against the Hon. Attorney General in place of the Respondents , whom the Respondents argue are agents of the National Government.
5. The Respondents argue that they are sued as officers of the Constituency Development Fund established under Section 43 of the National Government Constituencies Development Fund (NCDF) Act, 2015 and are responsible for implementation of development projects within Lugari Constituency under the supervision of the Constituency Development Fund(CDF) Board and not in their personal capacity.
6. The Claimants argue that the funds used in the administration of the office are disbursed by the CDF Board pursuant to section 5, and 6 of the (NCDF) Act and they do not have their own funds. They argue that funds dispersed to them emanate from the Consolidated Fund pursuant to Section 4 of the NGCDF Act and thus funds of the National Government.
7. The Respondents argue that the Constituency Development Fund is a National Government Agency established under the National Government Constituency Development Fund Act and all legal provisions relating to proceedings against the government apply to it. To buttress this position they have relied on the decision in Samuel Ngari Githinji V constituency Development Fund Board & Another ; Equity Bank Limited (Garnishee)(2021)eKLR where Justice S. Okong'o held:-

“A government body with the authority to implement and administer particular legislation – Also termed government agency; administrative agency; public agency; regulatory agency.”

I am convinced from the objects of the Acts establishing the CDFC/NGCDFC, the functions of the CDFC/NGCDFC, the composition of CDFC/NGCDFC, the extent of government control of the CDFC/NGCDFC through the CDFB/NGCDFB and the source of its funds that CDFC/NGCDFC is a government agency for the implementation of national government functions at the constituency.”



8. The Respondents argued that the Hon. Attorney General being the Principal legal adviser of the government by dint of Article 156(4) (b) of the Constitution of Kenya, ought to have been sued in this proceedings as any orders that may emanate from the claim are against the National Government and the Hon. Attorney General is responsible for advising the government on legal matters such as the present suit before the honourable court.
9. The Respondents relied on the decision in *Portia Mutema Robinson V Senior Resident Magistrate Children’s Court , Nairobi (2007) eKLR* , where the Court was guided by the decision in case of *Teitiwinnang V Ariong (1987)LRC Const 517* to stress the submission that the Government can only be sued through the Attorney general.
10. The Respondents further argue that the suit must enjoin the Constituency Development Board which is the entity in charge of all CDF Functions and the board is the only entity that in the event the Claimants’ suit were to succeed, would be the proper entity to settle a decree thereof as against the Respondents as officers of the CDF Lugari Constituency.

Claimant’s submissions

11. The Claimants in opposing the Respondents’ Preliminary Objection submit that the National Government Constituency Development Fund established by the Constituencies Development Fund Act, No. 30 of 2013(CDF Act) is responsible for disbursing money to constituencies to finance and implement Development projects.
12. The Claimants submit that they were employed by the Constituency Development Fund Committee which is governed by the CDF Act.
13. They submit that the Constituency Development Fund Board established under Section 5 of the CDF Act is a body corporate which is capable of suing and being sued and its functions set out in section 6 of the CDF Act. The Claimants submit that they failed to properly describe the Respondents which is not fatal to the proceedings, and the same can be cured through amendment.
14. The claimants submit that the suit raises triable issues labour issues that should be determined in a full trial. The claimants submit that if an amendment is allowed it will not prejudice the respondents.
15. The Claimants have relied on Lady Justice Monica Mbaru’s decision in *Elrc No. 1008 of 2015 Richard Maina Mwangi Versus John Kaguchia & Another* to argue that the CDF Board has no powers to hear employment matters which are raised in this honourable court.
16. The claimants argue that amendment of pleadings before trial is available to parties if no prejudice will be occasioned on the respondents and by virtue of Order 8 Rule 3 of the Civil Procedure rules, the court may at any stage of proceedings allow a party to amend its pleadings subject to costs or otherwise and under Order 8 Rule 5 of the Civil Procedure Rules, the court may on its own motion or on application by any party amend a document in a manner it may direct subject to matters as to costs or otherwise. To buttress this point, the claimants relied on Justice R.Wendoh decision in *Institute For Social Accountability & Another V Parliament Of Kenya & 3 others (2014)eKLR*, where the Honourable court outlined the principles for amending pleadings outlined in the case of *Elijah Kipngeno Arap Bii V Kenya Commercial Bank Limited (2013)eKLR*.
17. The Claimants submit that their suit relates to employment matters and it is not against the government to warrant the suing of the Attorney general and thus does not offend the provisions of section 13 and 13A of the Government Proceedings Act.



18. The Claimants pray that the court grants them permission to amend the party description or any other amendments; as the same will not prejudice the Respondents as the suit is yet to be heard.
19. The claimants argue that they have a right to amend their pleadings which can be done at any stage subject to the court's discretion which should be exercised judiciously relying on section 100 of the Civil Procedure Act and the preliminary objection be dismissed with costs.

Determination

20. The court having considered the parties' submissions will address the following issues:-
 - a. Whether the Attorney General is a necessary party in the proceedings
 - b. Whether non-compliance with notice under section 13 of Government Proceedings Act is fatal to the claim
 - c. Whether the suit is instituted against non-existent entity incapable of being sued under the law.

Issue a). As to whether the Attorney general is a necessary party to the proceedings

21. The respondent brought objection of non-compliance with the provisions of section 12 of the Government Proceedings Act to wit:- '12(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may.' That the claim was not instituted against the Attorney General or the Republic of Kenya as required by the law.
22. The Respondents argued that the CDF being under the National Government, obliges that the Attorney general must be sued in its place and quoted the case of Samuel Ngari Githinji v Constituency Development Fund Board & another; Equity Bank Limited (Garnishee) [2021] eKLR where the court held:-

“...Having reached the conclusion that CDFC/ NGCDFC is a government agency, it follows that the same is protected from execution by the provisions of the GP Act and Order 29 of the Civil Procedure Rules. In the circumstances, the plaintiff could only recover the judgment debt owed by the 2nd defendant in accordance with the provisions of the GP Act and not otherwise. ... “
23. It should be noted that judgment in the suit Samuel Ngari Githinji (supra) had already been entered as against the Constituency Development Fund Board, Dagoretti South Constituency Development Fund Committee (Formerly Dagoretti Constituency Development Fund Committee who had been sued in their own name. The point of contention related to the execution proceedings that prohibit execution against Government assets and which require compliance under section 21 of the Government Proceedings Act, where a certificate of Order against Government be served upon the Attorney General beforehand. That had not been done in the said suit.
24. In Council of Governors & 6 Others vs. Senate [2015] eKLR, a three judge bench of the High Court expressed itself as hereunder:

“The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue..... We are in agreement with the learned judge and it is clear to us that the Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings



but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd. Obviously, Mr. Kilukumi has misunderstood the law, because suing and being sued in one's name is different from representation.”

25. This position was affirmed by the Court of Appeal against the same decision in Council of Governors & 5 others v Senate & another (Civil Appeal 204 of 2015) [2019] KECA 704 (KLR) (7 June 2019) (Judgment)(where the court (Makhandia, DK Musinga, AK Murgor, JO Odek & S Ole Kantai, JJA) held:-

“.....For this reason, and for the purposes of this case, we do not consider it mandatory for the Attorney General to be the plaintiff or the defendant in all cases, and consequently, the failure by the Attorney General to represent the parties herein did not render the suit incompetent.” Emphasis mine

26. The issue of suing the Attorney General under Section 12(1) of the *Government Proceedings Act*, is “subject to the provisions of any other written lawas the case may be” and not mandatory. The said section must be read together with other statutes.

27. Where a Government entity is capable of being sued or suing in its own name as per the provisions of its establishing act , then it is allowed to be sued in its name and to sue in the same breath. The responsibility of the Attorney general would as rightly pointed by the Respondents, be limited to act as a legal advisor, under Article 156(40(b) of the *Constitution*, if the said entity seeks the representation of the Attorney General. Under the Act the Board is responsible for the liabilities of the 1st Respondent which had the mandate to engage as employees the claimants. The Court holds that the Attorney General was not a necessary party in the claim and that limb of the objection fails.

Issue b. Whether non-compliance with notice under section 13A of *Government Proceedings Act* is fatal to the claim

28. There is a requirement to issue 30 days notice under section 13A of the *Government Proceedings Act* to wit:- ‘13 A(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.’” The respondents state there was no compliance, before instituting the instant suit, with the provision which they urge is mandatory.

29. The court holds that It is not mandatory to issue the 30 days notice of intention to sue and that failure to issue the notice does not render a suit against the government agency incompetent. The law requiring notice being section13A (1) of the *Government Proceedings Act* was declared unconstitutional as it denied access by Majanja J in as stated in Kenya Bus Service Ltd & Another vs Minister for Transport & 2 others [2012] eKLR. The decision has been upheld by the court of Appeal . In Council of Governors & 5 others v Senate & another (Civil Appeal 204 of 2015) [2019] KECA 704 (KLR) (7 June 2019) (Judgment) the court of Appeal observed:-‘Next, we turn to whether failure to serve a 30 days notice as required by section 13A of the *Government Proceedings Act* rendered the suit incompetent. Our view in respect of counsel’s assertion that the declaration by Majanja, J in the case of Kenya Bus Service Ltd & Another Minister for Transport & 2 others (supra), that the provision was unconstitutional is that, much as this may have been the case, the decision has not been overturned on appeal. It therefore remains a valid decision, and courts are at liberty to cite it with approval, as was in the case of Joseph Nyamamba vs ILR [2015] eKLR where this Court endorsed the reasoning and holding in that case. This being a decision of this Court, though differently constituted, we see no reason to depart from that decision, and therefore we find that the failure to comply with section 13 A



did not render the suit incompetent”. The court holds that there was no requirement to issue notice under section 13A of the [Government Proceedings Act](#) hence that limb of the objection fails.

Issue c). Whether the suit is instituted against a non-existent entity incapable of being sued.

30. The Claimants sued Lugari National Constituency Development Fund Committee which the Respondents argue is a non-existent entity and that it is the National Constituency Development Fund Board ought to have been sued. The Claimants argue that they may have misnamed the parties and they have a right to amend their pleadings at any stage.
31. The relevant law is the National Government [Constituencies Development Fund Act](#) .
32. The Act replaced the Constituency Development Funds Act and under section 58 provides for transition as follows:- “(58)3) On the commencement day, all rights, powers and liabilities, whether arising under any written law or otherwise which immediately before such day were vested in, imposed on or enforceable against the Constituencies Development Fund Board established under the Constituency Development Fund Act, 2013 (No. 30 of 2013) shall be deemed to be vested, imposed or enforceable against the Board”
33. The Act defines the Board as Board" means the National Government Constituencies Development Fund Board established under section 14; Section 14 reads in part:- ‘(1) There is established a Board to be known as the National Government Constituencies Development Fund Board. (2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of— (a) suing and being sued;”.
34. Section 45 provides for Staff of the Constituency Committee thus , ‘section 45(1) The Constituency Committee may engage such staff as may be necessary for execution of its functions including persons with knowledge in information and communications technology, construction and basic accounting. (2) Staff employed under subsection (1) shall assist the Constituency Committee in project monitoring, evaluation, co-ordination and proper keeping of records and such staff shall be remunerated from the funds allocated for administration and recurrent expenses of the Constituency Committee.”
35. Section 56 of the Act provides for Dispute resolution reads :-“(58)(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) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary direct the Board in collaboration with the Office of the Attorney General to commence arbitration. (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.”
36. The claimants annexed their employment letters. The letters indicate the Claimants were all employed by Lugari National Government Constituencies Development Fund. Clause 10 of each of the employment letters read:- ‘You will be subject to provisions of [Employment Act](#) 2015 and the CDF Office staff rules and regulations issued.”



37. The claimant relied on the decision of Justice Monica M. Mbaru in *Richard Maina Mwangi v John Kaguchia- Chairman Mukurwe-Ini Constituency Development Fund Committee & another* [2015] eKLR where the court considered a similar objection and held:- ‘The context and provisions of section 49 must therefore be understood within the whole Act especially the functions of the CDF Board. To give responsibility and dispute resolution on employment and labour disputes would be to abrogate the role of such a Board that is not conferred in law and thus beyond its powers. This I find is not the purpose of section 6 of the CDF Act and not a role allocated to the Board established under 5 (3) read together with section 5(1) of the CDF Act....’ It should be noted the decision was under the repealed Constituency Development Fund. I do find Section 49 of the repealed Act to be similar to the provisions of section 56 of the National Government Constituencies Development Fund. I do find the decision to be persuasive to extent that it is the court with first instant jurisdiction over disputes like the instant one.
38. Section (58)3) National Government *Constituencies Development Fund Act* places liabilities of the 1st respondent on the Board as follows:”On the commencement day, all rights, powers and liabilities, whether arising under any written law or otherwise which immediately before such day were vested in, imposed on or enforceable against the Constituencies Development Fund Board established under the Constituency Development Fund Act, 2013 (No. 30 of 2013) shall be deemed to be vested, imposed or enforceable against the Board” I do find that the Board is a necessary party in these proceedings for purposes of enforcement of any liability against the 1st respondent.
39. The court holds that the failure by the Claimants to include National Government Constituencies Development Fund Board is not fatal to the suit as the same party may be cured through enjoined to the proceedings and the matter heard on its merit. The Claimants’ Memorandum of Claim raises substantive issues which can only be determined at trial and an amendment to enjoin the proper parties would not prejudice the Respondents. The Claimants argued that their suit can be amended, which position is true but the same is subject to a formal application to amend for the court’s determination in any event.
40. The court in *Republic v Attorney General & another Ex parte Orbit Chemicals Limited* [2017] eKLR held:-
- “29. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity. Article 159(2)(d) of the *Constitution* enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the national Government and not the said officer in his personal capacity.”
41. The contract of employment was between the 1st Respondent and the claimants. There was a clause that the *Employment Act* was applicable to the contract. Section 45 of the *National Government Constituencies Development Fund Act* (supra) empowered the 1st respondent to employ the claimants. The 1st respondent is the employer for the purposes of the *Employment Act*. The claim is thus competently before the court and the non joinder of the Board is not fatal to the claim.



42. In the upshot, I do hold that that the Attorney General need not be sued in every proceeding before this court if the government entity is the employer and an entity with capacity to be sued exists. The court is only concerned with existence of employer employee relationship which it holds in the instant case the 1st respondent is the employer and the claimants' are its employees holding employment contracts issued by it. Section 12 of the Employment and Labour Relations Court Act grants jurisdiction to the court as follows:- '12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including — (a) disputes relating to or arising out of employment between an employer and an employee;" The annexed contracts of employment disclose the 1st respondent as the employer and the claimants as its employees. The court holds that the suit is thus competent to be heard on merit on the grievances raised by the claimants against the respondents. The misjoinder of parties is not a proper ground to defeat a claim. See order 1 rule 9 of The Civil Procedure Rules to wit:- 'No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.'"In obiter it would be prudent for the claimants to make application to join the Board for conclusive consideration of the dispute. That remains their prerogative.
43. In the upshot the objection is without merit and is dismissed.
44. No order as to costs.
45. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF OCTOBER 2023.

JEMIMAH KELI

JUDGE

In The Presence of :-

Court Assistant: Lucy Macheso

Claimant : absent – date of ruling issued in the presence of Ndunge Wanyama

Respondent: absent

Further Court Order

Decision be emailed to the parties with notice of pretrial date of 9th November 2023.

It is so ordered.

JEMIMAH KELI

JUDGE

13/10/2023

