



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.2 OF 2020

HASSAN WILLY LESUPEN

LPITAMEDO MPAINE

PHILIP LETUYA LEDIDAH

ROSIAN LESANINGO.....PETITIONERS

VERSUS

THE NATIONAL GOVERNMENT CONSTITUTUENCIES

DEVELOPMENT FUND BOARD.....1ST RESPONDENT

THE SELECTION PANEL OF THE NATIONAL GOVERNMENT

CONSTITUENCIES DEVELOPMENT FUND COMMITTEE OF

BARINGO SOUTH CONSTITUENCY.....2ND RESPONDENT

AND

SAMUEL KIPROTICH BURGEL.....1ST INTERESTED PARTY

GEOFREY KIPKEBUT.....2ND INTERESTED PARTY

ZAKIA JEMUGE KIPTUISANG.....3RD INTERESTED PARTY

HELLEN CHEPTOO.....4TH INTERESTED PARTY

CHRISTINE JEPKEMBOI KANDIE.....5TH INTERESTED PARTY

EUNICE TARKOK.....6TH INTERESTED PARTY

JUSTICE KIPRONO CHEBIL.....7TH INTERESTED PARTY

MARIAMU NTAUSIAN LEKISEMOM.....8TH INTERESTED PARTY

RULING

The petitioner filed the petition on 20th January, 2020 and in response the 1st respondent filed a Replying Affidavit of Elizabeth Chesoni, legal officer of the 1st respondent.

The 1st respondent also filed Notice of Preliminary Objections.

The ruling herein relates to the objections.

The objections herein are that the application by the petitioners is defective and there is no reasonable cause of action known in law and ought to be struck out.

a) The 1st respondent as [has]clearly been wrongly enjoined herein since any alleged complaints/cause of action the petitioners have is strictly against the 2nd respondent, if any.

b) The application and petition herein offends the mandatory provision of section 56(3) of the National Government Constituencies Development Act, 2015 (the Act) which makes it mandatory for all disputes to be referred to the Board for Arbitration in the first instance. The petitioners have prematurely rushed to court without exhausting the mandatory dispute resolution procedures prescribed in the Act.

c) The petitioners' contention herein that the Baringo South CDF Committee members ought to be appointed based on their ethnicity has no legal basis in law and is thus a gross abuse of the court's process. The qualifications, appointment and composition of the members of the Constituency Development Fund Committee is well governed and embodies in Section 43(2), (3) and (4) of the said Act and Regulations 5(6) of the National Government Constituencies Development Fund Regulations, 2016 and ethnic considerations are not a criteria therein.

d) The petitioners' push to have the selection committee appoint its alleged Ilchamus ethnic group members in contravention of what is provided for in the Act is an illegality and thus a gross abuse of the court process. This court cannot be used to aid such a purely tribal agenda.

e) ...

f) In any event the suit is overtaken by events since the Baringo South Constituency Committee members were long gazetted on 3/1/2020 and this suit has not sought the cancellation of such gazette and is thus in vain.

Both parties made oral submissions.

The 1st respondent's counsel submitted that the application by the petitioners is defective as the 1st respondent is not involved in the selection of applicants to be members of the Constituency Committee members which is done by the 2nd respondent. Regulation 5 and 6 of the CDF gives the qualifications to be applied and not ethnicity. The push by the petitioners to have the Ilchamus appointed to the committee is in contravention of the law.

Section 56(3) of the National CDF Act provides that all disputes relating to matters therein should go to arbitration. The suit herein is thus filed prematurely.

The petitioners have filed Nairobi ELRC Misc. No.166 of 2019 and obtained orders therein contrary to the provisions of section 56(1) and (3) of the National CDF Act.

The petitioners submitted that the 1st respondent is a creature of the 2nd respondent and cannot speak for the 2nd respondent and herein blame the 2nd respondent. The action by the 1st respondent to gazette the interested parties can only be addressed on the merits.

The petitioners also submitted that they tried to engage in negotiations as alternative dispute resolution and have attached the minutes but there was no resolution. What is in court is not a triable agenda and even if it is this is not a question of law and can only be addressed at the full hearing. To state that the petition is overtaken events is a matter of fact and the objections made should be dismissed.

The principles upon which preliminary objections can be based upon is settled in the case of **Mukisa Biscuits Manufacturing Ltd versus West End Distributors (1969) EA 696** where their Lordships observed thus:

... 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.

...

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

Objections at the preliminary stage must relate to a question of law and not fact and upon determination of the issue of law, the petition may be disposed. There must be a pure point of law which does not require the call of evidence to be ascertained or confirmed. See **Beatrice Wambui Kiarie & others versus Beatrice Wambui Kiarie & 9 others [2018] eKLR** and the Court of Appeal in the case of **Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others**

[2019] eKLR.

From the objections by the 1st respondent, the matters of law which the court find for determination are;

Whether the 1st respondent is proper enjoined herein; and

Whether the petition offends the provisions of section 56(3) of the national Government Constituencies Development Act, 2015.

The case is that the 1st respondent is wrongly enjoined herein as the selection of members of the National Government Constituency Development Fund Committee including the Baringo Constituency Committee is the duty of the 2nd respondent and not that of the 1st respondent.

In the petition, the petitioners define themselves as from Baringo South and members of the Ilchamus ethnic group resident in Baringo South Constituency. They also define the 1st respondent as a body corporate established under section 14 of the National Government Constituencies Development Fund Act, 2015. While the 2nd respondent is defined as a body constituted pursuant to regulation 5(3) of the National Government Constituencies Development Fund Regulations, 2016.

The orders sought in the petition are against the respondents following the application, selection, nominations and appointments of members to the Baringo National Government Constituencies Development Fund Committee for the Baringo South Constituency.

Page 24 of the petition is exhibit "E" *Invitation for Applications* by the 1st respondent. an invitation for eligible persons to apply for membership. This is set out as the core issue in the petition.

The 1st respondent thus becomes a core respondent herein and cannot be extricated from the proceedings herein and to do so would be to remove a party that is necessary and proper. There are specific orders sought against the 1st respondent jointly and severally with the 2nd respondent.

For the court to effectively and completely adjudicate upon the petition, the 1st respondent is a necessary party herein.

With regard to the provisions of section 56 (3) of the National Government Constituencies Development Fund Act, 2015 it provides that;

56. (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) ...

(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) ...

These provisions requires parties with a dispute premised under the National Government Constituencies Development Fund Act, 2015 to forward them to the Board under the Act.

By letter dated 23rd December, 2019 the petitioners' through their advocate wrote to the respondents of *Dispute over the selection, nomination and appointment of members of the National Government Constituencies Development Fund Committee*

— *Baringo South Constituency*. To these averments and the records filed in this regard, the 1st respondent has not addressed.

Even where the petitioners have not referred the matter to the board or caused the same to be referred to arbitration, section 56 of the National Government Constituencies Development Fund Act, 2015 does not oust or restrict the jurisdiction of the Employment and Labour Relations Court for want of exhaustion of the procedure and remedies envisaged under the section.

The court enjoys original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between parties with regard to employment and labour relations and for connected purposes as vested under articles 159(1), 162 (2) (a) as read with article 165(5) and (6) of the Constitution, 2010; articles 22(1) and 258(1) of the Constitution, 2010, and the provisions of the Employment and Labour Relations Court Act, 2011. See **Abdikadir Suleiman versus County government of Isiolo & Another, Cause No. 76 of 2015 (Nyeri)**.

The 1st respondent also made reference to Nairobi ELRC Misc. No.166 of 2019 that the court therein has issued orders contrary to the mandatory provisions of section 56 (3) of the National Government Constituencies Development Fund Act, 2015. The petitioners at paragraph 14 acknowledge they filed the matter following the 1st respondent's decision and moved to have such decision stayed. That addressed, it cannot be a bar to the petitioners filing the instant petition.

Other objections put into account and relating to matters of facts can only be gone into at a full hearing.

Accordingly, the objections by the 1st respondent are found without merit. The 1st respondent has since filed a Replying Affidavit and responded to the Petition, taking into account the time gone into, the court shall hear the main petition on priority basis.

Costs herein awarded to the petitioners.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of:

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