



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**

**AT KISUMU**

**PETITION NO. 2 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango on 19<sup>th</sup> March, 2015)**

**SILAS O. MASAWA.....PETITIONER/APPLICANT**

**-VERSUS-**

**ANNE MIKOYO & 6 OTHERS.....RESPONDENTS**

**-AND-**

**THE CONSTITUENCY DEVELOPMENT FUND BOARD.....INTERESTED PARTY**

**R U L I N G**

By a petition dated and filed on 21st January 2015 supported by his affidavit sworn on even date the petitioner Silas Owiti Masawa seeks the following orders:-

- a. Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.
- b. Declaration that the petitioner is the duly appointed and gazette Chairman, Awendo Constituency Development Fund Committee and hence has the mandate to and/or in accordance with the Constituency Development Fund Act, 2013.
- c. Declaration that the actions and/or omissions of the respondents herein constitutes and/or amounts to unfair labour practices, mistreatment of the petitioner and gross abuse of office.
- d. Declaration that the respondents have violated and/or acted in contravention of the provisions of the Constituency Development Fund Act, 2013, by barring, restraining and/or prohibiting the petitioner from accessing his office and discharging his duties, without regard to the rights of the petitioner.
- e. Permanent injunction, restraining the respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting the 1st respondent and/or any other person as the chairperson of Awendo Constituency Development Fund Committee, preventing, barring, restricting and/or interfering with the petitioner's performance and/or execution of his duties as the chairman, Awendo Constituency Development Fund Committee, whatsoever and/or howsoever, subject only to observance of the provisions of the Constituency Development Fund Act, 2013.

f. Permanent injunction restraining the 1st respondent or any other person, fronted by and/or at the instance of the rest of the respondents from assuming and/or purporting to act as (sic) the chairperson, Awendo Constituency Development Fund Committee, and/or discharging the functions and exercising the duties of the office of the chairman, Awendo Constituency Development Fund Committee, in violation of the provision of Constituency Development Fund Act, 2013.

g. Costs of the petition be borne by the respondents jointly and/or severally.

h. The honourable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.

The petition was filed together with a notice of motion filed under certificate of urgency seeking the following orders:-

1. That the application herein be certified urgent and the same be heard *ex parte* in the first instance.

2. That pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction, restraining the respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Chairman, Awendo Constituency Development Fund Committee, whatsoever and/or howsoever, subject only to observance of the provisions of the Constituency Development Fund Act, 2013.

3. That pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction restraining the rest of the respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting the 1st respondent and/or any other person as the chairman, Awendo Constituency Development Fund Committee, contrary to and in contravention of the provisions of the Constituency Development Fund Act, 2013.

4. That pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction, restraining the 1st respondent or any other person, fronted by and/or at the instance of the rest of the respondents from assuming and/or purporting to act as (sic) the chairperson, Awendo Constituency Development Fund Committee and/or discharging the functions and excising the duties of the office of the chairman, Awendo Constituency Development Fund Committee, in violation of the provisions of Constituency Development Fund Act, 2013.

5. That pending the hearing and determination of the instant application, the Honourable court be pleased to grant an interim conservatory order, to protect, preserve and/or conserve the status of the petitioner/applicant as the chairman, Awendo Constituency Development Fund Committee.

6. The honourable court be pleased to grant an order of temporary injunction, prohibiting and/or restraining the respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's /applicant's performance, discharge and/or execution of his duties as the chairman, Constituency Development Fund Committee and/or discharging the functions and exercising the duties of the office of the Chairman, Awendo Constituency Development Fund Committee, whatsoever and/or howsoever, subject only to observance of the provisions of the Constituency Development Fund Act, 2013, pending the hearing and determination of this petition.

7. The honourable court be pleased to grant an order of temporary injunction, prohibiting and/or restraining the respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance,

discharge and/or execution of his duties as the chairman, Awendo Constituency Development Fund Committee, contrary to and in contravention of the provisions of the Constituency Development Fund Act, 2013, pending the hearing and determination of this petition.

8. The Honourable court be pleased to grant an order of temporary injunction, prohibiting and/or restraining the 1st respondent or any other person, fronted by and/or at the instance of the rest of the respondents from assuming and/or purporting to act as (sic) the chairperson, Awendo Constituency Development Fund Committee, and/or discharging the functions and exercising the duties of the office of the chairman, Awendo Constituency Development Fund Committee, in violation of the provision of Constituency Development Fund Act, 2013, pending the hearing and determination of this petition.

9. The honourable court be pleased to grant conservatory order, to protect, preserve and/or conserve the status of the petitioner/applicant as the Chairman, Awendo Constituency Development Fund Committee, pending the hearing and determination of this petition.

10. The conservatory orders, if any, granted by this honourable court to be implemented and/or enforced by the OCPD, Awendo Police Division/OCS, Awendo Police Station and/or such other officer as the honourable court may decree.

11. Costs of this application be borne by the respondents jointly and/or severally.

12. Such further and/or other orders be made as the court may deem fit and expedient.

The notice of motion is also supported by the Petitioner's affidavit sworn on 21st January 2015 and the following other grounds:-

a. The petitioner/applicant was duly appointed and gazetted as the chairman, Awendo Constituency Development Fund Committee on the 4th day of June 2013.

b. Having been appointed as the Chairman, Awendo Constituency Development Fund Committee (hereinafter referred to as the Committee), the petitioner/applicant herein was authorized and/or mandated to call, convene and chair the meetings of the subject Committee herein, which committee comprised and/or composed of the respondents as members.

c. On the other hand, the respondents herein by virtue of being Committee members, were obliged to attend, participate in and deliberate upon the various issues and/or affairs of the Committee, *albeit* in accordance with the provisions of the Constituency Development Fund Act, 2013, (hereinafter referred to as the Act).

d. On or about the 17th day of April 2014, the respondents herein without mandate and in excess of jurisdiction and abuse of their offices, (sic) purported to suspend the petitioner/applicant from the performance and/or execution of his duties as the Chairman of the Committee.

e. Following and/or pursuant to the resolution and/or decision of the respondent to (sic) suspend the petitioner/applicant herein, the petitioner/applicant complained to and/or lodged a complain with the interested party, seeking for clarification as to whether the respondent were seized of the capacity and/or jurisdiction to allegedly suspend the petitioner.

f. Subsequently, the interested party herein wrote to and/or clarified the issue with the 7th respondent, whereby the interested party, stated and underlined that the petitioner applicant herein by virtue of being a duly appointed member and chairman of the Committee can only be removed by the interested party, upon due gazettelement.

g. Notwithstanding the clarification by and/or at the instance of the interested party, the respondents herein again purported to remove the petitioner/applicant from the office pursuant to the alleged

meeting called and/or convened on the 25th day of August 2014.

h. Following the subsequent attempt, the petitioner/applicant again lodged a complaint with the interested party, who reiterated the position and/or communication vide letter issued and dated 1st August 2014.

i. Notwithstanding the clarification by and/or at the instance of the interested party, the respondents herein have continued to subject the petitioner/applicant to undue harassment, intimidation and thereby denied the petitioner/applicant of the right and/or liberty to carry out and/or discharge the duties of the petitioner's office.

j. Besides the respondents herein have also barred the petitioner/applicant from accessing the office of the chairman and/or deprived the petitioner/applicant of rightful remuneration, in accordance with the provisions of the Act.

k. Nevertheless, the respondents have also conspired and removed the petitioner/applicant from being a signatory to the Committee's Account and thereby paved way for misuse, misappropriation and pilferage of the Constituency Funds.

l. As a result of the foregoing, the petitioner/applicant contends that the actions of the respondents herein, (details in terms of the foregoing paragraphs), amounts to violation of the petitioner's Constitutional and Fundamental Rights and hence requiring urgent address and protection.

m. The actions of the respondents herein (details in terms of the foregoing paragraphs), amounts to violation of the petitioner's/applicant's Constitutional and Fundamental Rights and hence requiring urgent address and protection.

n. As a result of the foregoing, the petitioner/applicant has been barred and/or prohibited from discharging his (petitioner's) duties as the Chairman, Awendo Constituency Development Fund Committee.

o. Consequently, the petitioner/applicant has been subjected to unfair Labour Practices and mistreatment by and/or at the instance of the respondents.

p. The respondents are guilty of violating and/or contravening the provisions of Articles 41(1) and 47(2) of the Constitution, 2010.

q. In the premises, the petitioner/applicant is likely to be charged with desertion of duty.

r. Consequent to the acts and/or omissions of the respondents, the petitioner/applicant has suffered and is bound to suffer an infringement of his Constitutional rights and thus requiring the protection of this honourable court.

s. The actions and/or omissions complained of are Dehumanizing and Discriminatory in nature.

t. In the premises, the petitioner/applicant has a *prima facie* case against the respondents.

u. The acts of the respondents shall occasion irreparable loss to the petitioner/applicant.

v. Unless, there is urgent and appropriate intervention, the respondents are bound to continue with the illegal and unfair practices meted out against the petitioner/applicant.

w. Consequently, this is a fit and proper case to grant conservatory orders of injunction.

x. It is in the interest of justice that the application herein be granted *ex-debito justitiae*.

The petitioner's advocate Mr. Oguttu appeared before me *ex parte* on 21st January 2015 when I certified the application urgent and directed that he serves the same on the respondents. I fixed the application for hearing *inter partes* on 10th February 2015.

When parties appeared before me on 10th January 2015, Mr. Mboya appeared for the petitioner while Mr. Otieno appeared for the respondents and interested party, the Constituency Development Fund Board. Mr. Otieno informed me that the respondents and interested party had filed a notice of preliminary objection which ought to be heard before the application.

The preliminary objection dated 9th February and filed on 10th February 2015 raises the following grounds of objection:-

1. This court lacks jurisdiction to entertain the present claim regard being to Article 162 of the Constitution of Kenya.
2. The jurisdiction is ousted by the provisions of Section 49 of the Constituencies Developments Fund Act 2013.
3. The application and the petitioner offend the mandatory provisions of the Employment Act and the Industrial Court Act.

The parties proceeded to argue the preliminary objections.

Mr. Otieno submitted that this court has no jurisdiction to hear the petition as there is no relationship of employer/employee between the petitioner and the respondents. He referred to the definition of employee in the Employment Act 2007 and the Industrial Court Act. Mr. Otieno further referred to Article 162(2) (a) which provides for the court to determine matters of employment and labour relations. Mr. Otieno submitted that the petitioner was appointed by a gazette notice to be a chair of Awendo Constituency Development Fund Committee. He submitted that the petitioner as chairman and other members of the Committee earn no salaries. They are paid sitting allowances. They are distinguished members of society who are volunteers and act *gratis*. He further submitted that the gazette was by the cabinet secretary in-charge of planning and development acting under the provisions of Section 24 of Constituency Development Fund (CDF) Act. The appointment was by the member of parliament who is not a party to these proceedings.

He submitted that since there is no employment relationship between the petitioner and respondents this court lacks jurisdiction to hear the matter. That without jurisdiction this court must down its tools.

On the second ground, Mr. Otieno submitted that even if this court had jurisdiction, it would still not be able to hear the petition as Section 49 of the CDF Act creates an alternative disputes resolution mechanism in line with Article 159 of the Constitution. That where there is such alternative disputes resolution mechanism a litigant is bound by law to exhaust the alternative disputes resolution mechanism. He submitted that by handling this case the court would be imputing incompetence by and usurping the jurisdiction of the body empowered to handle the dispute.

He further urged the court to strike out the case as this court's jurisdiction has not been invoked properly and the matter has been placed before the improper forum. He referred the court to the decision in **Nick Githinji Ndichu V Clerk, Kiambu County Assembly & Another [2014] eKLR.**

Mr. Mboya for the petitioner opposed the preliminary objection which he submitted is misconceived and therefore legally untenable. He submitted that the petitioner had an employment relationship with the interested party to warrant the petition being lodged in this court. He further submitted that the respondents were workmates of the petitioner through whose instance the petitioner was removed in execution of their mandate as member of the CDF Committee.

Mr. Mboya further submitted that this court should look at jurisdiction to include not just employment,

but labour relations also. That the relationship between the petitioner and interested party amount to employment as the petitioner received allowances made to members as demonstrated by appendices at pages 36 and 37 of the petition which cover payments of allowances. That the allowances were disbursed under Section 45 of CDF Act under which the payment is circumscribed. That among the items authorized to be paid out of CDF funds are overheads, salaries and allowances.

On Mr. Otieno's submission that the MP has not been enjoined to the suit, Mr. Mboya submitted that the petitioner and members of CDF board are not employees of the MP as they are elected as provided under Section 24 of CDF Act. Once selected the members elect a chairman from among themselves before the names are transmitted for gazette. He submitted further that it is misleading to insinuate that the petitioner is an employee of the MP. He submitted that this court has jurisdiction and refusal to exercise that jurisdiction would amount to abdication under Article 159(1) of the Constitution.

On the second ground of objection Mr. Mboya submitted that Section 49 of the CDF Act relating to arbitration does not apply to constitutional issues which are founded on violation of fundamental rights and breach which can only be vindicated by a superior court. He cited Article 165(3)(b) and (d)(ii) which apply to violations of Article 41 and cannot therefore be determined by the interested party. Mr. Mboya stated that even if Section 49 ousts the constitutional mandate of this court a party seeking to invoke the arbitral clause must comply with Section 6(1) of the Arbitration Act. That the bringing of this preliminary objection divests the applicant of the provisions of Section 6(1) of Arbitration Act and the applicant has therefore lost that right.

He further submitted that the petitioner did not abandon the tribunal as there was an attempt towards securing an administrative intervention of the interested party. He submitted that the interested party is wanting of the exercise of due diligence and dispatch as provided in Article 47. He further submitted that the provisions of a statute or Act of Parliament is subordinate and subservient to the Constitution. That Section 49 should not be raised as a pedestal to limit the provision as this would amount to disregarding the Constitution.

Mr. Oguttu urged that the court dismisses the preliminary objection.

I have considered the arguments by both parties on the preliminary objection and the case cited by Mr. Otieno for the respondents and interested party. In any case where the issue of jurisdiction is raised the court must first deal with it before it can embark on any other issues. In the case of "**Lillian S" Nyarangi J** stated that jurisdiction is everything and without it, a court ought to down its tools.

In the present case Mr. Otieno for the respondents and interested party has submitted that this court lacks jurisdiction to hear the petition on grounds that it does not have jurisdiction. This is based on the fact that the petitioner has no employment relationship with either the respondents or interested party. Mr. Oguttu on the other hand submitted that the petitioner earned allowances from the interested party and that this dispute involves labour relations which this court has jurisdiction to determine under both Article 162(2) of the Constitution and Section 12 of the Industrial Court Act.

Section 2 of the Employment Act defines an employee as:-

**"A person employed for wages or a salary and includes an apprentice and indentured learner".**

Article 162(2) provides that:-

**"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to, land".**

This court's jurisdiction is provided for under Section 12 of the Industrial Court Act. The Act provides that this court has jurisdiction to hear and determine disputes relating to employment and labour relations including:-

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers' organization and a trade unions organization;**
- (d) disputes between trade unions;**
- (e) disputes between employer organizations;**
- (f) disputes between an employers' organization and a trade union;**
- (g) disputes between a trade union and a member thereof;**
- (h) disputes between an employer's organization or a federation and a member thereof;**
- (i) disputes concerning the registration and election of trade union officials; and**
- (j) disputes relating to the registration and enforcement of collective agreements.**

The petitioner was gazetted as the Chairman of Awendo Constituency Development Fund Committee on 4th June 2013 by the Cabinet Secretary Ministry of Devolution and Planning pursuant to the provisions of Section 24 of the Constituencies Development Fund Act after being elected and appointed in the manner provided therein. Section 24(14) provides the procedure for removal of a member of the Committee.

Section 24(17) provides for the employment of staff by the Committee.

From the above provisions, it is clear that the only employees of the CDF Committee are the staff employed pursuant to Section 24(17) by the Committee. This means that Committee members, including the chairman, are not staff of the CDF Committee. Committee members, including the Chairman are elected by registered voters and thereafter appointed by the member of parliament of the Constituency in consultation with the officer of the Board from among names of persons elected by voters in the constituency. They are then gazetted by the Minister for Devolution and Planning. The chairman and Committee members do not have terms of employment, are not paid wages or salary but earn a sitting allowance only when they attend meetings.

For the foregoing reasons, I find that there was no employment relationship between the petitioner and the respondent or interested party. The petition is not an employment or labour relations dispute. This court therefore has no jurisdiction to hear and determine the petition.

This being the case, I do not have jurisdiction to consider any of the other grounds of objection. The petition is transferred to the High Court at Migori for hearing and determination.

**MAUREEN ONYANGO**

**JUDGE**

**19/3/2015**

**Appearances:-**

Mr. Ogutu for Petitioner/Applicant

Mr. Otieno for both respondents/Interested Party

CC. Wamache