



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1008 OF 2015

RICHARD MAINA MWANGI.....CLAIMANT

VERSUS

JOHN KAGUCHIA- CHAIRMAN MUKURWE-INI

CONSTITUENCY DEVELOPMENT FUND COMMITTEE.....1ST RESPONDENT

**MUKURWE-INI CONSTITUENCY DEVELOPMENT FUND COMMITTEE...2ND
RESPONDENT**

RULING

1. On 28th July 2015 the Respondent filed their Notice of Preliminary Objections to the claim on the following grounds that;

1. *The suit herein is incompetent and incurably defective, as the Claimant has deliberately avoided the mandatory procedure and remedy provided for under section 49 of the Constituency Development Fund Act No.30 of 2013.*
2. *The 1st and 2nd Respondent are non-suited in contravention of section 5(3) as read together with section 49(5) of the Constituencies Development Fund, 2013.*
3. *The tribunal [court] lacks jurisdiction to try and dispose off this matter.*

2. The Respondent submitted that the Claimant ought to have taken the dispute before the Constituency Development Fund Board (CDF Board) as under section 49 of the CDF Act. The dispute herein emanate from the Respondent performance of their functions under the CDF Act and such complaints ought to be lodged with the CDF Board for arbitration. The Respondent rely on the case of **Robert A Azariah & 6 Others versus Kenya Railways Staff Retirement Benefits Scheme [2015] eklr** where the court held that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed as held by the Court of Appeal in **Speaker of National Assembly versus Njenga karume [2008] 1 KLR**.

3. The Claimant should have filed his dispute with the CDF Board as his claim is based on the contravention of section 5(3) and 49(5). The Board is a corporate body capable of being sued and no member of the Fund should be held personally liable in any action taken against their official capacity. Where the orders sought are granted, to execute the same against the 1st respondent will be in contravention of the Act. Section 5 of the CDF Act establishes the Board as a corporate body.

4. The respondent also submitted that the court lacks jurisdiction to hear this matter under the provisions of section 49(1) and (3) of the CDF Act.

5. The Claimant on his part submitted that his contract of employment was governed by the Employment Act and this court has the jurisdiction on employment relationship. The contract of employment was specific that the employment of the Claimant would be governed under the Employment Act. In the case of **Charles Maina Nyaruai versus Kieni Constituency Development Fund, Cause No. 79 of 2014**, the court held that the termination of the employment contract was unfair and in breach of agreed terms.

6. That the objections herein relate to a 'dead' Act. That the CDF Act is not in force and the Claimant would not get justice were he to enter into arbitration with the Respondent who have breached his fundamental rights.

7. The main issue in contention is whether the court has jurisdiction to hear this matter and the suitability of the parties sued herein as respondents. I take note of the Court of Appeal in Owners of the Motor Vehicle "Lillian S" versus Caltex Oil (K) Ltd [1989] KLR where the court held that

... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

8. The jurisdiction of this court has its conceptual framework within article 162(2) read together with article 41 of the constitution. The court is granted the original and exclusive jurisdiction to hear employment and labour relations matters. Such jurisdiction is further defined in statute under the Employment and Labour Relations Court Act at section 12. All matters employment and labour relations in Kenya are to be addressed by the court. This I find to be the basis upon which the court delivered judgement in the case of **Charles Maina Nyaruai versus Kieni Constituency Development Fund**.

9. Under the CDF Act the CDF Board is established under section 5 as a body corporate capable of being sued and can sue. Any dispute under the Act must be directed at the CDF Board. Section 49 of the CDF Act make provisions for all disputes concerning the administration of the Act, but not the interpretation of the constitution or the act itself to be addressed as under the mechanism established therein in the first instance.

10. Section 5 must be read in whole and together with section 6 and then 49 to anybody to appreciate the role of the CDF Board, its functions and matter then that can be addressed under the mechanism established under section 49 thus;

[5] (3) 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;

11. Section 6;

6. (1) The functions of the Board shall be to –

(a) to ensure timely and efficient disbursement of funds to every constituency;

(b) to ensure efficient management of the Fund;

(c) to receive and discuss annual reports and returns from the constituencies;

(d) ensure the compilation of proper records, returns and reports from the constituencies;

(e) receive and address complaints and disputes and take any appropriate action;

(f) consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;

(g) perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.

[emphasis added].

12. Section 49;

49. (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, the Cabinet Secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.

(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.

13. 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.

14. A look at the Memorandum of Claim is that the matters in dispute are the non-payment of;

- a. *Service gratuity*
- b. *Salary arrears*
- c. *Overtime*
- d. *Unpaid leave*
- e. *Terminal dues*
- f. *Underpayment*

15. These I find are matters governed under the Employment Act read together with the provisions of article 41 of the constitution. These are not matters within the CDF Board mandate under its constitutive Act or any other law. For the CDF Board to arbitrate over such matters, the resultant outcome would have no legal basis.

16. The Claimant was employed by the **Mukurwe-ini Constituency Development Fund** the CDF Act establishes the **Constituency Development Fund Board** as the corporate body which can sue and be sued. Where the Claimant has not properly described the Respondent and called them **Mukurwe-ini Constituency Development Fund Committee**, such is not a fatal error to the proceedings herein. Such can be well amended before trial commences for the court to address the substantive issues raised in the Memorandum of Claim. The 1st respondent is sued in the official capacity as *chairman Mukurwe-ini Constituency Development Fund Committee*. In the letter of appointment, renewal of contract, the letters are signed under the official capacity of **CDFC**. Such **CDFC** is not outlined as to its full name. to therefore remove the 1st respondent from the proceedings herein without call of evidence would be the injustice. Equally as held in the case of **Kizito Lubano versus KEMRI Board of Management & Others, Petitioner 47 of 2015** which made reference to **Amon –vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273** it was held *inter alia* that;

... A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter.

17. Where the court finds that to appreciate the functions of the Respondent will facilitate the course of justice, evidence must be called in that regard. Therefore such presence of both Respondent is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. to terminate the suit at this point would be to pre-empt such evidence without giving it a chance.

18. I have carefully gone through the case of Wilson **Wachira Ngunjiri & Another versus Ol'joro'orok Constituency Development Fund Committee & Others, Petition No.36 of 2014 (Nakuru)** as submitted by the respondents, the matter related to the administrative functions of the respondent that the petitioners were seeking to challenge. This is fundamentally different from the claim herein which relates to rights under the Employment Act and not under the CDF Act. In the case of **Robert Azariah and others** as submitted above, the dispute related to the operations of the respondent of the petitioners pension funds under the Retirement benefits scheme regulated under the Retirement Benefits Act (the RBA Act). Matters of pension's scheme are clearly outlined in the RBA Act and any dispute must be addressed by the RBA Tribunal as the case is for employment and labour relations disputes which must be heard by this court. to thus compare the procedures applicable for matters relating to retirement benefits with matters that the CDF Board should address, I find to be a misconception of the constitutive law for retirement benefits, constituency development funds and employment and labour relations.

The objections raised by the respondent are hereby dismissed with costs to the claimant.

Orders accordingly.

Dated signed and delivered in open Court at Nairobi this 12th day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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