



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

**INDUSTRIAL CAUSE NO. 21 OF 2014**

**(Nyeri High Court Judicial Review No. 2 of 2014)**

AMIN MOHAMED ALI.....APPLICANT

***VERSUS***

FUND MANAGER, LAIKIPIA EAST

CONSTITUENCY DEVELOPMENT FUND.....1ST RESPONDENT

THE LAIKIPIA EAST CONSTITUENCY

DEVELOPMENT FUND COMMITTEE.....2ND RESPONDENT

HON. ANTHONY MUTAHI KIMARU.....3RD RESPONDENT

NEWTON KABUTHIA, CHAIRMAN, LAIKIPIA

EAST CONSTITUENCY DEVELOPMENT

FUND COMMITTEE.....4TH RESPONDENT

**JUDGMENT**

1. The applicant in this suit sought and obtained leave of the court to apply for Judicial Review orders against the respondents particularly that an order of certiorari to quash the alleged resolution of Laikipia East Constituency Development Fund Committee made on 29th July, 2013 to remove and expel the applicant as the Chairman and committee member of Laikipia East Constituency Development Fund Committee. The applicant further sought judicial review order seeking to quash the appointment of one Newton Kabuthia as his replacement. The applicant thus consequently sought his reinstatement to the position as chair of 1st respondent When the exparte chamber summons came before me on 17th January, 2014 I granted leave to apply for judicial review orders and directed that the application be made within 21 days of the order. I however declined to direct that the grant of leave do operate as a stay.
2. The applicant consequently lodged the substantive motion on 4th February, 2014. The application is supported by the applicant's statement of facts and verifying affidavit and annexure filed in support of ex-parte chamber summons filed on 17th January, 2014 seeking leave.
3. The gist of the applicant's complaint for which he seeks judicial review order are:

- i. *That the Ex parte Applicant is a male adult, professing the Islamic Religion and was elected by the people of Thingithu Ward to represent them in Laikipia Constituency Development Fund Committee.*
- ii. *That on 30th April, 2013 the Ex parte Applicant was elected Chairman of the 2nd Respondent in accordance with section 24(3) (d) of Constituencies Development Fund Act.*
- iii. *That as required by section 24(4) of the constituencies Development Fund Act the Cabinet Secretary gazetted the name of the Ex parte Applicant as the Chairman of the 2nd Respondent.*
- iv. *That the Ex parte Applicant has at all times performed his duties efficiently, diligently and in accordance with the Law.*
- v. *That on 1st August, 2013 the Ex parte Applicant informed the 1st Respondent, a member of the 2nd Respondent, of his absence from the Country in the months of August, September and October, 2013 via a letter dated 1st August, 2013.*
- vi. *That on 24th October, 2013 the Ex parte Applicant informed the 2nd Respondent through the 1st Respondent of his return to the Country via a letter dated 24th October, 2013.*
- vii. *That on 3rd December, 2013 the Ex parte Applicant received a letter dated 25th October, 2012 informing him of his removal from the Chairmanship and expulsion from the committee.*
- viii. *That the Ex parte Applicant was taken aback by the said letter and questioned its intentions.*
- ix. *That the letter dated 25th October, 2013 claimed that a unanimous decision had been reached by the C.D.F committee on 29th July, 2013.*
- x. *That on the 29th July, 2013 the Ex parte Applicant was still in the Country and was not informed of this clandestine meeting.*
- xi. *That the Ex parte Applicant has been denied access to the minutes of the meeting held on 29th July, 2013.*
- xii. *That the 1st Respondent as the custodian of all records is under a duty to inform and disseminate all information to the committee members and the public.*
- xiii. *That if indeed there was a meeting held on the 29th July, 2013 it was illegal and unlawful for the Chairman did not convene it nor was he invited to attend it.*
- xiv. *That the Respondents denied the Ex parte Applicant a right to be heard.*
- xv. *That the Respondents denied the Ex parte Applicant a chance for a fair hearing as is stipulated under section 24(15) of the constituency Development Fund Act and Article 50 of the constitution.*
- xvi. *That the Ex parte Applicant is still unaware of the reason why he was ousted from the Chairmanship.*
- xvii. *That the process leading to the removal and expulsion of the Ex parte Applicant was irregular unprocedural and not in line with Section 24 of the Constituencies development Fund Act.*
- xviii. *That the appointment of 4th Respondent as the Chairman of the 2nd Respondent is irregular and unlawful.*
- xix. *That the 4th respondent was and is unqualified to be the Chairman of the 2nd Respondent.*

xx. That the Ex parte Applicant being a Muslim, a man nominee from Thingithu Ward ought to have been replaced by a person of the same caliber and not a nominee from the NGO and this is by dint of section 24 (11) of the Constituency Development Fund Act.

xxi. That the respondent acted in violation of Article 27, 28, 41 and 47 of the Constitution hereby infringing on the rights of the Ex parte Applicant.

xxii. That the people of Thingithu Ward are aggrieved that their chosen elected member has been summarily removed without any adherence to the Laws of Kenya.

xxiii. That the people of Thingithu Ward remain unrepresented in the Laikipia East Constituency Development Fund Committee.

1. According to his affidavit sworn on 16 January, he deposes that:

i. That on 30th April, 2013 I was elected Chairman by members of the 2nd Respondent in accordance with the Constituencies Development Fund Act.

ii. That as required by section 24(4) of the constituencies Development Fund Act the Cabinet Secretary gazetted my name as the Chairman of the 2nd Respondent.

iii. That on 1st August, 2013 I was to attend to personal matters overseas, and I informed the Fund Manager of my absence from the Country in the months of August, September and October, 2013 via a letter dated 1st August, 2013.

iv. That on 24th October, 2013 upon my return, I informed the 2nd Respondent through the 1st Respondent of my arrival into the Country via a letter dated 24th October, 2013.

v. That on 3rd December, 2013 I received a letter dated 25th October, 2013 informing me of my removal from the Chairmanship and expulsion from the committee.

vi. That the letter dated 25th October, 2013 claimed that a unanimous decision had been reached by the C.D.F committee on 29th July, 2013.

vii. That on the 29th July, 2013 I was still in the Country and was not informed of the said clandestine meeting.

viii. That I have been denied access to the minutes of the meeting held on 29th July, 2013.

ix. That I am still unaware of the reason why I was ousted from the Chairmanship and from being a member of the 2nd Respondent.

x. That the process leading to my removal and expulsion was irregular, unprocedural and not in line with the Constituencies Development Fund Act.

xi. That the appointment of NEWTON KABUTHIA as the Chairman of the 2nd Respondent is irregular and unlawful.

xii. That NEWTON KABUTHIA was and is unqualified to be the Chairman of the 2nd Respondent.

xiii. That I am informed by my advocate which information I believe to be true that being a Muslim, a man nominee from Thingithu

Ward I ought to have been replaced by a person from the same category and not a nominee from the NGO and this by dint of Section 24 (11) of the Constituency Development Fund Act.

xiv. That I am also informed by my advocate, information which I brief to be true that the respondent acted in violation of article 27, 28, 41 and 47 of the Constitution hereby infringing on my rights.

xv. That the people of Thingithu Ward remain unrepresented in the Laikipia East Constituency Development Fund Committee.

1. The respondent on its part opposed the application and concurrently therewith raised a preliminary objection to the effect that the 1st and 2nd respondents were not legal persons capable of being sued and that the application was ultra-vires section 49 subsection (1) and (3) of the CDF Act No. 30 of 2013.

2. Concerning the factual basis of the application, the 1st respondent through its Secretary Mr. Arnold Karani Njiri filed a replying affidavit refusing the allegations by the applicant. He depones among others that:

i. That on 27th July I received a written request from 7 members of the Laikipia East Constituency Development Fund Committee (hereinafter referred to as "the Committee") to convene an urgent committee meeting to discuss the conduct of the then Chairman who is the Ex-parte Applicant in this case. A copy of the request is annexed herewith as Exhibit "CDFC 1".

ii. That the specific acts of misconduct complained of and to be discussed at the meeting as set out in the letter of request were as follows:

(a) Unilateral and illegal formation of Ward Bursary Committees.

(b) Illegal payment by the Chairman to members of the said committee.

(c) Misappropriation of sports uniforms by the Chairman.

iii. That pursuant to the request, I convened the meeting on 29th July, 2013 at the Committee Boardroom.

iv. That amongst the persons invited was the Applicant who duly attended the meeting.

v. That as it is conduct of the Applicant, which was to be discussed, the meeting was presided over by the Vice Chairperson Ann Wangechi Mwangi.

vi. That after deliberations and upon the applicant having been afforded the opportunity to defend himself and upon satisfaction by the committee that the allegations against the applicant had been proved, the Applicant offered to resign as Chairman of the committee and indicated that he would be submitting his written resignation.

vii. That the committee however resolved that it would even in absence of a written letter of resignation remove him as Chairman and Member of the Committee in terms of Section 24, subsection 14, of the Act.

viii. That the Applicant was in attendance during the deliberations except when he decided to walk out after indicating he had resigned.

ix. That a second session of the meeting was held later in the afternoon of the same day in which replacements of the Applicant as member and Chairman of the Committee were made. A copy of the minutes of the second session of the meeting is annexed herewith as "Exhibit CDFC 3".

x. That the vacancy created by the removal of the Applicant was filled in terms of Section 24 Subsection 16 of the Act by appointment of the one John Mutahi Muritu as member.

- xi. *That on the same date and in a different session of the meeting a new chairman in the name of Newton Kabuthia was elected as Chairman to replace the Applicant. Minutes of the said session are annexed herewith as "Exhibit CDFC 4".*
- xii. *That in the end, the Applicant did not tender a written resignation which in the opinion of the committee did not matter anyway.*
- xiii. *That as the Fund Account Manager, I was privy to the Applicant's unilateral and illegal formation of Ward Bursary Committees as the Applicant submitted to me lists of names of persons he had appointed to the committees demanding from me reimbursement from Committee Funds of payments of moneys he had made to them from his own resources. Copies of the said lists are annexed herewith as "Exhibit CDFC 5".*
- xiv. *That I made reimbursement to the Applicant as demanded though under duress and intimidation by depositing into his account the sum of Kshs.93,000 which he claimed as such. Annexed herewith as "Exhibit CDFC 6" is a copy of the deposit slip.*
- xv. *That it is not true that the applicant informed me by letter or otherwise of his absence and return to the country as alleged and I never saw or heard from him from 29th July, 2013 until 25th October, 2013 when he came to the office and I drew his attention formally to the decision of the committee made on 29th July, 2013 which he was aware of in any case.*

1. The depositions by Mr. Njiri triggered a response from the applicant in which he denies attending any meeting to discuss his conduct. He further denies misappropriating any funds and argues that if there was any misappropriation, why was not any action taken against him? He depones that decision to form Ward Stakeholders committees was unanimous and that the payment of Kshs.500 to each member was agreed on.
2. He depones that the 1st respondent was facing shortage of funds since money had not arrived from the national government hence it was decided that he could as chair use his personal funds and later be reimbursed. According to him the reimbursement was done willingly and on 24th December, 2014 long after he had been unprocedurally removed as chairman of the 2nd respondent.
3. He further depones that the minutes appear contradictory in terms of date and time the alleged meetings were held suggesting they could have been doctored.
4. The applicant depones that he later learnt that his removal could have been due to the ideological differences with the 3rd respondent. To demonstrate this he attached a transcript of a video recording in which he allegedly had a conversation with the 1st respondent at which the ideological differences were confirmed. The first respondent however filed an affidavit refuting that he had a conversation with the applicant in which he talked with the applicant about his(applicant's) ideological differences with the 3rd respondent.
5. At the hearing of the motion Mr. Abubakr for the applicant submitted that his client became aware of his removal on 3rd December, 2013 when he was served with a letter dated 25th October, 2013 communicating his removal and replacement. According to counsel his client sought the minutes of the meeting where his removal was discussed without success. According to counsel his clients saw the minutes for the first time when they were attached to the replying affidavit of the 1st respondent. According to counsel, his client was never aware and did not attend the meeting where his removal was discussed.
6. Concerning grounds for removal, counsel submitted that the allegations were criminal in nature yet were never forwarded to law enforcement agencies for further action.
7. According to counsel judicial review is not concerned with the decision but the procedure for arriving to the decision.

8. Mr. Abubakr submitted that the removal and replacement of the applicant was not in conformity with section 24 of the CDF Act in that if there was to be replacement of the applicant, that replacement was to be from the same category where the vacancy occurred, further his clients replacement was never elected as per section 24 of the CDF Act since no quorum was met as the members listed were ex-officio members and that the minutes were signed by the DC and not the Secretary as required by the Act.
9. Concerning the preliminary objection as to legal capacity of the 1st and 2nd respondent to be sued, counsel submitted that the 1st and 2nd respondent signed the minutes of the meeting where the applicant was removed. They were involved in the removal of the applicant. He submitted that though the Act talks of Fund Account manager. The omission to include the word account was not fatal or material. In any event Fund Account Manager had put in an affidavit in opposition to the application.
10. Concerning reference of the dispute to the CDF Board, counsel submitted that the applicant felt that there would be bias if the matter was taken to the Board. According to counsel, the applicant was informed by the respondent that the Board always sided with the area MP. He further submitted that the allegations against the applicant were criminal in nature hence the Board lacked jurisdiction over criminal matters.
11. Mr. Kariuki for the respondent on his part submitted that the 1st and 2nd respondents were not legal persons capable of suing or being sued. According to Counsel, the CDF Act did not provide for a person going by the name of the 1st respondent. The Act makes reference to Fund Accounts Manager and he or she is not a member of the CDF committee as per the Act. According to counsel the question of who the Fund Manager was cannot be answered from the Bar. Counsel submitted that Mr. Arnold Njiri swore the replying affidavit as secretary to CDFC and was the person who was served. According to counsel, he held the office described under section 24(1) (f) and that he was not the Fund Accounts manager. His position according to counsel was a responsibility and not an office. Counsel submitted that the court could not go beyond section 24 to introduce or recognize an entity not recognized by the Act.
12. In the alternative, counsel submitted that if indeed such a creature existed no allegation had been made against the 1st respondent in the application. According to counsel, the wrong complained of ought to have been in the statement yet nothing in the statement touches on the respondent. The only complaint touching on him is that he authored the letter of removal which according to counsel was a mere communication from the committee. This could not constitute any wrongdoing on the part of the 1st respondent.
13. According to counsel, the correct entity to be sued is the the CDF Board and not the CDFC which is an appendage of the former. CDFC according to Counsel acts on behalf of the Board and any one with a complaint can sue the Board and not CDFC.
14. Counsel further submitted that if the issue of capacity is resolved in favour of 1st and 2nd respondents, the entire suit collapses as no order could practically be made against 3rd and 4th Respondents.
15. Regarding forum for dispute resolution, counsel submitted that all disputes ought to be referred in the first instance, to CDF Board unless the Board itself was a party.
16. Concerning the removal, counsel submitted that this met the requirements of the Act. According to counsel, the allegations amounted to gross misconduct. It was his submission that the meeting took place and the applicant was invited and attended but could not chair as he was the subject of the discussion. The applicant according to counsel verbally offered to resign but left before the meeting could be concluded.
17. Counsel submitted that the applicants membership to the Board was not on the basis of special

interest group but was simply in his capacity as a Ward representative. His nomination was on the basis of his gender. His religion was not a factor according to counsel.

18. In response to Mr. Kariuki's submissions, Mr. Abubakar submitted that the respondents were properly sued. He contended that Fund Account Manager is an officer of the Board. According to counsel the 1st respondent was a party to the decision to remove the applicant. He convened the meeting at which the applicant was removed. He is in the circumstances capable of complying with the order of the court. He is further capable of convening a meeting to communicate the order of the court. Counsel further submitted that when it comes to Judicial review any party in the position of making a decision is subject to judicial review and thus can be sued. Further the committee as gazetted does not disclose names but positions. To this extent, the office of the Fund Account Manager exists.

19. The determination of this dispute revolves around the legal capacity of the 1st and 2nd respondent to be sued as such and second, whether removal process of the applicant adhered to the CDF Act and rules of natural justice generally and finally if the court were to find in the applicant's favour, what would be the appropriate remedies.

20. Regarding capacity to sue, section 24(1) of the CDF Act provides that there shall be a Constituency Development Fund Committee for every constituency. Subsection 2 of the said section further provides that each CDFC shall comprise a national official as may be designated by the CS, three men nominated by the Ward Development Committees one of whom shall be a youth, three women one of whom shall also be a youth, one person with disability, one person nominated from among the active NGO's in the Constituency and an officer of the Board seconded to the committee by the Board who shall be ex-officio and shall serve as the Secretary.

21. Subsection 14 of section 24 lists grounds for removal of a member of the CDFC which are:

**(a) Lack of integrity**

**(b) gross misconduct**

**(c) embezzlement of public funds**

**(d) bringing the image of the committee into disrepute through unbecoming personal public conduct**

**(e) promoting unethical practices**

**(f) causing disharmony within the committee**

**(g) physical or mental infirmity.**

22. Subsection 15 provides that the decision to remove a member shall be made through a resolution of at least five members of committee and the member sought to be removed shall be given a fair hearing before the resolution is made.

23. This far, is the structure, composition and powers of the CDFC. The Act however is silent on the legal capacity of the CDFC when it comes to suing or being sued. In contradictory, section 5 of the Act establishes CDF Board and under subsection 3 confers upon it capacity to sue or be sued.

24. The functions of the Board are listed under section 6(1) as follows:

*(a) To ensure timely and efficient disbursement of funds to every constituency.*

*(b) ensure efficient management of the Fund*

*(c) receive and discuss annual reports and returns from constituencies.*

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

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

*(f) consider project proposal submitted from various constituencies in accordance with the Act*

*(g) perform such other duties as the Board may deem necessary further proper management of the Fund.*

25. Further under section 7 (1) the Act provides that the conduct and regulation of the business and affairs of the Board shall be as provided in the Fourth Schedule. Rule 4(1) of the fourth schedule provides that the Board may establish such committees as it may deem appropriate to perform such functions and responsibilities. Stopping here, it is important to note that whereas the CDF Board is empowered under rule 4(1) of the fourth schedule to constitute such committees as it may deem appropriate to perform such functions as it may deem necessary, CDFC is clearly not one such committee since its formation is substantively provided for under section 24 of the Act.

26. Going by their composition, the CDF Board is a national body while CDFC's are local bodies operating in the constituencies. The CDF Board is thus an overarching body more with a supervisory and oversight role over the CDFC's. What this means is that CDFC's are committees sui generis with more or less autonomous powers in running the affairs of the fund at constituency level. This perhaps explains why the Act has made it deliberate to provide for its structure and composition with the Board merely as one of its members. The CDFC's has been conferred with the power to remove its members for reasons set out under section 24(14) without involvement of the Board. In the process of removal, CDFC's have been enjoined to accord such member a fair hearing. To this extent CDFC's are akin to tribunals or quasi – judicial bodies. Whereas the Act is silent on the capacity of the CDFC's to sue or be sued, the powers and functions conferred upon them inevitably makes them amenable to judicial process in absence of any express provision to the contrary. As stated earlier CDF Board is a national organization. Its tasks as it were are to coordinate and supervise activities CDFC's and report to parliament or relevant committee thereof. It would not only be onerous but untidy to expect the CDF Board to be sucked in all manner of litigation involving CDFC's. To this extent the court finds that the 1st and 2nd respondent and indeed all of them are properly before the court and dismisses the objection over their capacity to be sued.

27. The next question is whether in removing the applicant the 1st and 2nd respondents followed the law. Section 24(14) of the Act referred to earlier in this judgment lists grounds for removal of a member of CDFC while subsection 15 of the same section provides that the decision for removal must be through a resolution of at least five members of the committee and that the member sought to be removed shall be given a fair hearing.

28. According to the affidavit of Arnold Karani Njiri who depones that he is the 1st respondent's Secretary, he received on 27th July, 2013, written request from 7 members of the 2nd respondent to commence an urgent meeting to discuss the conduct of the Chairman (the applicant herein). The written request is attached to his affidavit and marked "CDFC 1". It is purportedly signed by the Vice Chairperson, Treasurer and five other members. The request lists the reasons why the conduct of the chair ought to be discussed and further states that by a copy of the letter, the area member of Parliament was requested to notify the chairman and the deputy county commissioner of the planned meeting. He deponed further that pursuant to the request he convened a meeting on 29th July, 2013. That is to say 2 days later. It was his deposition that among the persons invited and who duly attended was the applicant.

29. According to Mr. Njiri, after deliberations and after the applicant was afforded an opportunity to defend himself and upon satisfaction that the allegations against the applicant were proved, the applicant offered to resign verbally and stated he would follow with a written resignation. The minutes of the meeting are attached and marked "CDFC 2".
30. The applicant for his part has denied attending the meeting of 29th July, 2013 which he referred to as clandestine. This denial therefore presents difficulty concerning the minutes purportedly taken at the said meeting where the applicant is noted as among those present.
31. The letter convening the meeting tasked the area member of parliament to inform the applicant of the meeting where his conduct was to be discussed. In the face of this denial, it would have been helpful to the court if the area member of parliament could have sworn an affidavit stating how the applicant was notified of the meeting and whether the notification included the allegations against him in order for him to prepare his defence.
32. Concerning the minutes, the court observes that they are not recorded in the traditional way minutes, are usually recorded and further that they did not capture adequately how the agenda that led to the convening of the meeting was discussed and how the resolutions were reached. That is to say, whereas the agenda had been listed in the said minutes as follows:
- (a) Meetings of formation of Wards Bursary Committees held in every Ward between 22nd and 26th of July, 2013 presided over by the chairman.*
- (b) Payment of Ksh.500 to the members of the said Ward Bursary Committee as authorized by the Chairmanship.*
- (c) Removal of sports uniform from the CDF officers and subsequent distribution of the same in the month of June, 2013 as authorized by the chairman;*
33. The meeting seemed to have suddenly shifted to a discussion over the relationship between the chairman and the area Member of Parliament. There is no recording of how the items of the agenda were discussed and the applicants response thereon and how the resolution to remove him was reached. One curious aspect of the minutes and which counsel for the applicant correctly observed is that whereas the issue of payment of Ward Bursary Committee members was one of the main reasons for removal of the applicant as per the meeting of 29th July, 2013; this payment has been acknowledged was made by the applicant from his personal funds with an understanding that he would be refunded.
34. The applicant was removed and replaced on 29th of July, 2013 yet Mr. Njiri depones that the applicant put undue pressure on him to refund the sum of Kshs.93,000 which he did on 24th December, 2013, almost five months after removal from office. One gets to wonder what sort pressure or influence a hapless and fired chairman would have on Mr. Njiri to pay public funds on account of refund for unauthorized expenditure. It is difficult to comprehend why Mr. Njiri could not refuse or at least report such pressure to lawful authorities.
35. One other curious aspect of the minutes is that in one day the applicant was removed, his replacement identified and introduced to members of the committee. They smack of a hurry to seal the applicants' fate leaving no room self-reflection on the issue. One can only suspect an orchestrated plan to remove the applicant get done with it.
36. From the foregoing the court reaches the inevitable conclusion that no meeting ever took place and that the purported removal of the applicant never occurred with the consequence that the letter dated 25th October, 2013 communicating such removal is hereby declared null and void.
37. Having so found, the court hereby orders that Mr. John Mutahi Muritu who was purportedly

elected to replace the applicant is hereby declared invalidly in office and ought to cease holding such office forthwith. The court further orders that the issue of removal of the applicant if deemed necessary be considered afresh in accordance with CDF Act and rules of natural justice generally. Until that is done, the applicant remains in office as the chair of CDFC Laikipia East. His resumption of duty is however stayed for 30 days to enable CDFC members prepare for his resumption of duty or recommence his removal if still necessary in accordance with the CDFC Act and rules of natural justice.

38.It is so ordered

***Dated at Nyeri this 6th day of June 2014.***

**ABUODHA N. J**

**JUDGE**

***Delivered in open court in the presence of Mage Wa Magee***

***Advocate for the Applicant and in the presence of Mr. Kahiga holding brief for Mr. Mwangi Kariuki Advocate for the Respondents.***

**ABUODHA N. J**

**JUDGE**