



**Sadia & another v Rarieda Sub County Fisheries Officer & 3 others (Constitutional
Petition E055 of 2022) [2023] KEHC 215 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E055 OF 2022**

RE ABURILI, J

JANUARY 25, 2023

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 22, 23, 27, 28,
47, 48, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF DISENGAGEMENT FROM OFFICE OF THE CHAIRMAN
OF ADALO BEACH MANAGEMENT UNIT (BMU), JOSEPH OMONDI SADIA**

AND

**IN THE MATTER OF DISENGAGEMENT FROM OFFICE OF THE CHAIRMAN
OF ADALO BEACH MANAGEMENT UNIT (BMU), DAVID OCHIENG MILANDO**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTIONS ACT, CAP 296 OF LAWS OF KENYA,**

AND

IN THE MATTER OF THE LAW REFORM ACT

BETWEEN

JOSEPH OMONDI SADIA 1ST PETITIONER

DAVID OCHIENG MILANDO 2ND PETITIONER

AND

RARIEDA SUB COUNTY FISHERIES OFFICER 1ST RESPONDENT

**CHIEF OFFICER, DEPARTMENT OF AGRICULTURE, IRRIGATION, FOOD,
LIVESTOCK AND FISHERIES, SIAYA COUNTY 2ND RESPONDENT**

DIRECTOR OF FISHERIES, SIAYA COUNTY 3RD RESPONDENT

BMU NETWORK CHAIRMAN, RARIEDA SUB COUNTY .. 4TH RESPONDENT



RULING

1. The main question under investigation in this ruling which I am delivering following a hearing of an application this afternoon is whether the court can arrest or stay or recall a pending ruling to allow a party to have their submissions considered by the court.
2. This matter was due for Ruling today on the Preliminary Objection dated December 19, 2022, the matter having been reserved on January 16, 2023. Directions for disposal of the Preliminary Objection were given on December 14, 2022 and the matter fixed for mention on January 16, 2023 to fix a Ruling date.
3. As at January 16, 2023, the Respondents 1,2 and 3 had complied and filed their submissions to dispose of the Preliminary Objection.
4. The Petitioner's counsel never appeared on January 16, 2023 and neither had they filed their written submissions as directed on December 14, 2022. The court therefore fixed the date for Ruling on the Preliminary Objection as the 1st, 2nd and 3rd Respondents had complied.
5. The court retired to write the ruling and on January 24, 2023, on the eve of the said ruling delivery, the Petitioners' counsel filed an application dated January 19, 2023 to arrest the Ruling slated for January 25, 2023.
6. In the application which is supported by the affidavit of Steve Biko Osur advocate sworn on January 19, 2023, counsel for the Petitioners beseech this court to recall the Ruling which is set for delivery today to enable the court consider their written submissions which were not filed in time but which they have now filed simultaneous with this application. Counsel deposes that on December 21, 2022, 2 days after the court directed the filing of submissions, Ms. Muyoka advocate who had conduct of the matter proceeded on maternity leave her files were yet to be reassigned.
7. That it was while reassigning her files that on the morning of January 16, 2023, the applicants' advocate discovered that despite the submissions having been drafted, the same were yet to be filed in court.
8. That the advocate tried to log into the court session to explain the situation but that he experienced technological challenges hence, by the time he logged in successfully, the matter had already been dealt with and directions given reserving the matter for delivery of the ruling.
9. That he has honestly explained the circumstances of the case and that this court has jurisdiction to grant the orders sought and to do justice to the parties without imposing conditions on itself to fetter the wide discretion bestowed on it by the rules of procedure.
10. That the applicants have no intention of obstructing or delaying the cause of justice hence the court should grant the orders to avoid injustice or hardship resulting from accident, inadvertence, excusable error or mistake.
11. That if the application is not granted, the applicants will be condemned without a hearing yet the omission is on the part of their advocate's honest mistakes and that they will suffer irreparably.
12. That the Respondents stand to suffer no prejudice as they can be compensated by an award of thrown away costs; and that it is in the interest of justice that the orders sought are granted.
13. The Respondents' counsel Mr. Okanda who had attended court this morning to take the ruling as reserved on January 16, 2023 was confronted with the application which he had not been served with



as the same was only considered last evening after court session and directions given and communicated to the applicants’ counsel after 5 pm.

14. Nonetheless, Mr. Okanda perused the court file and intimated that he was ready to argue orally in opposition to the application.
15. The application was therefore argued orally both by Mr. Osur Biko advocate submitting on behalf of the applicants/petitioners while Mr. Okanda submitted in opposition, on behalf of the 1st, 2nd and 3rd Respondents.
16. Mr. Osur relied on the grounds and his own deposition in the affidavit dated January 19, 2023, which I have highlighted above whereas Mr. Okanda submitted in opposition thereto contending that the application is not merited because the Preliminary Objection challenges the jurisdiction of the court based on the doctrine of ripeness and that the court has power on its own motion to examine the question of its jurisdiction even without allowing the parties to submit on the same.
17. Counsel submitted that the petitioners’ conduct demonstrate lack of interest in the matter and that it is about one month ago since the court mentioned the matter and fixed a ruling date.
18. That maternity leave is not an emergency as it was anticipated and that the petitioners’ counsel should have made their internal administrative arrangements to manage the situation.
19. That there is no evidence that this matter is of public interest and that as the ruling is ready for delivery, there is no reason why this court should not deliver it, instead of arresting it. He urged the court to dismiss the application.
20. In a rejoinder, Mr. Biko submitted that compassion is a basis upon which courts are called upon to exercise discretion, and in this case, so that the Petitioners’ side of the Preliminary Objection can be considered before a decision is rendered.

Analysis and Determination

21. I have considered all the foregoing and, in my view, the issue for determination is whether this court should allow the application seeking to arrest the Ruling of the court scheduled for delivery today, upon reserving the same on January 16, 2023.
22. From the face of the application, it is brought under the provisions of Sections 1A, 3, 3A of the [Civil Procedure Act](#), Order 51 rule 11 of the [Civil Procedure Rules](#) and Article 159(2)(d) of the [Constitution](#).
23. There is no specific provision in law which allows courts to stay delivery of judgments or rulings in favour of reopening the matters which have already been canvassed and closed. However, this court enjoys inherent powers which are exercised with discretion. In [Samuel Kuti Lewa v Housing Finance Company of Kenya Limited, & another](#) [2015] eKLR, the High Court persuasively stated as follows at paragraph 20:

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such reopening does not embarrass or prejudice the opposite party. In that regard, reopening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for reopening of the case will be defeated by inordinate delay which is unexplained.”
24. This court has unfettered discretion in matters before it, which discretion must however, be exercised judiciously not capriciously.



25. The applicants seek to recall the Ruling set to be delivered today on a Preliminary Objection to the jurisdiction of this court based on the doctrine of ripeness. The parties were accorded the opportunity to file submissions to canvass the Preliminary Objection but only the 1st, 2nd and 3rd Respondents who moved the court on the Preliminary Objection filed their submissions hence the court reserved the matter for ruling as was.
26. The Respondents' counsel argues that on matters jurisdiction, the court has power to determine that question on its own motion even without reverting to parties to submit.
27. It is true that jurisdiction of the court is everything without which a court of law acts in vain and therefore the moment it finds that it has no jurisdiction to entertain dispute, it must do no more than down its tools. See *Motor Vessel 'Lilian S' v Caltex Oil Kenya Limited*. However, where there are parties who have appeared in a matter and one party takes the position that the court has no jurisdiction whereas the other party holds a different opinion or view, the court must accord each of the parties an opportunity to advance their rival positions before it can make an informed decision even if the court believes that it has no jurisdiction. The right to be heard cannot be denied to a party who wishes to be heard to ventilate the issues raised.
28. Indeed, in some instances, it is the court that invites the parties to submit on the question of jurisdiction of the court. That is how the court makes its inquiry into its jurisdiction to inform itself better. Learning is continuous as no one has the monopoly of knowledge on the law as it keeps evolving from time to time in view of judicial pronouncements that interpret the law differently from time to time.
29. In some instances, however, on the face of it, the court may find that the question of jurisdiction is so apparent that the Court cannot wait for the parties to attempt to clothe it with jurisdiction. For example, where the dispute purely and overtly, from the pleadings, falls within the jurisdiction of the Environment and Land Court or the Employment and Labour Relations Court or the Supreme Court as stipulated in Articles 162(2) and 165(5)(b) of the *Constitution*.
30. To my mind, not all cases involving questions of jurisdiction of the court are clear cut and therefore hearing both sides of the case would assist the court render a well-informed decision.
31. On the other submissions by the Respondents' counsel that maternity is not an emergency and that administrative arrangements ought to have been made to ensure compliance with court's directions, I would rather reserve my comments on that as it borders gender sensitivity.
32. The only question is whether there is intention to delay this matter. From the court record, it is clear that Ms. Muyoka appeared on December 14, 2022 when the court gave directions on timelines for filing of written submissions to canvass the interlocutory application and that the issue of the Preliminary Objection came in at that stage which made it necessary to dispose it of first.
33. This court is also aware that directions were given in the month of December when most law firms take rest until end of the year and therefore although the period for compliance with the court's directions coincided with Ms. Muyoka's maternity leave, I am alive to the provisions of Order 50 Rule 4 of the Civil Procedure Rules on when time does not run between 21st December and 13th January. This not to say that parties should use that as an excuse but that where issues arise as to compliance and where the matter does not involve an injunction, then the court's attention must be drawn to the law and applied in favour of a defaulting party
34. Counsel for the applicants has explained the delay and even annexed the submissions which are said to have been discovered drafted but not filed, as at January 16, 2023, when the office was reassigning the files for Ms. Muyoka advocate who had to proceed on maternity leave during the December break.



35. Those submissions have been perused by this court. They are detailed enough and they indeed respond to the Preliminary Objection filed and argued by the 1st and 2nd Respondents' counsel. They are not frivolous submissions, if I may say so as they are backed by law both statutory and judicial pronouncements.
36. Albeit filed late after the court had already retired to write the ruling on the Preliminary Objection, it is the view of this court that the applicants should not be locked out of the proceedings despite coming late in the day. Lateness in the corridors of justice is unlike a flight whose doors have been closed. No one can be allowed in. In court, the doors of justice must be open at all times but not like the Ritz Hotel (Judge Sir James Mathew (1830–1908)) whose doors are open at all times but to those who can afford. In matters justice, this Court is called upon to do justice to all, irrespective of status. The Court too is implored to ensure that justice is administered without undue delay. The court must therefore at all times balance those constitutional dictates in favour of parties before it, for, the law as made by the people, exists for the benefit of the people and not people existing for the benefit of the law. The law must at all times remain the servant of the people and not the people playing servitude to the law, which law, they must nonetheless, obey, it being the people's own command on how they wish to be governed.
37. Counsel urged the court to be compassionate. My understanding of his plea is that he implored the court to exercise its discretion, which discretion must, as a principle, be exercised judiciously. What matters is good faith and the justice of the matter for, Justice and goodwill will outlast passion. (James A. Garfield) 1831-1881).
38. The court will also consider what prejudice the Respondents will suffer if the applicants are allowed to have their submissions considered. I find no such prejudice and none was demonstrated.
39. Instead, I find that it is the applicants who largely be prejudiced if their submissions are not considered for reasons that the court will render a decision which only looks at one side of the coin and as unopposed, when the applicants could, given an opportunity, shed more legal light to the court in the matter before it. Off course, submissions are not evidence. They are supposed to contain legal arguments only.
40. The court should not lock out legal arguments that can help it do justice to the parties not only in this case but also in any other case. The Respondents are public officers and it is their decisions while in office which are impugned. The court will, sometimes and it happens that even after close of submissions but before rendering itself, the court on its own comes across an authority or legal material which could have a bearing on the outcome of a matter.
41. This has happened to this court before. In such cases, the fairest thing to do and which I have done before, is to recall the judgment or ruling and invite the parties to make comments on the new found legal authority before making use of it in a decision.
42. On the part of counsel too, should they come across legal authority which may assist the court arrive at its decision after closure of submissions, they are duty bound to bring to the attention of the court that legal material so that the court can render itself authoritatively on matters of the law. It is also not lost on this court that even new evidence discovered after hearing of the case may cause a case to be reopened even on appeal.
43. The court exists to render itself on the law such that an authority which may aid the court to arrive at the most correct decision should not be shut out unless to do so would jeopardize a party's right to a fair hearing.



44. The weight to be placed on the submissions will depend on the quality and correctness of the submissions on points of law.
45. The Petition is freshly filed. No delay has been occasioned by the applicants save in filing submissions which delay has, in my view, been explained.
46. Finally, I observe that this Court was being called upon to determine the preliminary objection because it was argued by counsel for the respondents that it would dispose of the entire petition as it is purely on a point of law. Since disposal of the petition on a preliminary point will mean that the petition may not be heard on merit if the preliminary objection is sustained, I find that it is in the interest of justice to accord the petitioners an opportunity, despite their default, to advance their position before a decision is made.
47. The petitioner's submissions on the preliminary objection having been filed together with this application, despite the fact that I had already written the ruling disposing of the preliminary objection, which ruling I have not rendered or pronounced myself on before the parties, I find that the appropriate order to make in this matter is as follows:
 1. That it is in the interest of justice that the Ruling slated for delivery today be recalled and stayed. I hereby recall and stay the delivery of the ruling on the preliminary objection slated for today January 24, 2023.
 2. That the applicants' written submissions on the Preliminary Objection filed simultaneous with this application on January 24, 2023 be and are hereby admitted as duly filed.
 3. That the Applicants to serve the Respondents' counsel with the said written submissions forthwith and send them to annextures@gmail.com
 4. That the court shall therefore render its decision based on the written submissions as filed by both counsel for the petitioners/applicants and the Respondents on the Preliminary Objection.
 5. Directions on the rehearing of the preliminary objection to follow in the proceedings
 6. Each party to bear their own costs of this application.
48. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 25TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE

