



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

JUDICIAL REVIEW NO. E002 OF 2021

BETWEEN

SAMWEL ODIRA OSEWE.....APPLICANT

VERSUS

THE HOMA BAY COUNTY

EXECUTIVE COMMITTEE FOR

AGRICULTURE, LIVESTOCK, FISHERIES

& COOPERATIVES..... 1ST RESPONDENT

THE SUB COUNTY FISHERIES OFFICER MBITA.....2ND RESPONDENT

RULING

1. The applicant moved the court by way of Notice of motion dated 20th September, 2021 under sections 3A, & 63 of Civil Procedure Act, Order 40 Rules 2(1), 3, 4(1), 5 & 6 of the Civil Procedure Rules & sections 2,3,4, 5, 6 7, & 9 of the Fair Administrative Action Act, 2015. He is seeking the following orders:

- a) That this matter be certified as urgent and service of the application be dispensed with in the 1st instance. [Spent]
- b) That the applicant be granted leave to commence judicial review proceedings against the respondents in the nature of prohibition and mandamus to move into this court and to quash the directive by the respondents to call for repeat elections at Kiumba Beach Management Unit.
- c) That an order of injunction do issue against both the 1st and 2nd respondents barring the respondents whether directly by themselves or their agents from annulling the election of the applicant and calling for repeat of BMU elections at Kiumba Beach pending the hearing and determination of this application.
- d) An order or declaration that the applicant is the duly elected Kiumba Beach (BMU Chairman).
- e) Costs of, and incidental to the application be provided for.

2. The application was premised on grounds that can be summarized as follows:

- a) The applicant was elected as the chairperson of Kiumba Beach Management Unit on the 11th January 2021.
- b) The said elections were conducted legally in pursuant to the Fisheries (Beach Management Unit) Regulations 2007, supervised and approved by the 1st and 2nd respondent's officers
- c) The respondents' officers were the presiding officers of the said elections.
- d) Upon counting the respective presiding officers announced the election results declaring the applicant a winner.

e) The applicant was issued with a valid certificate of election by the County Director of Fisheries dated 11th February 2021 stating that he was successfully elected as the Chairman of Kiumba BMU for a period of 4 years having fulfilled the requirements under the Fisheries Management and Development Act 2016 and the BMU Regulations 2007.

f) Upon the said declaration, the applicant took over office and has been performing his duties as the BMU Chairperson for Kiumba Beach.

g) On the 1st July 2021 the county Executive Committee illegally directed the County Director of Fisheries to ask the applicant to return his certificate to the CEC without any justifiable cause.

h) On the 15th September, 2021 the 2nd respondent under the directive of the CEC wrote to the applicant instructing him to update his BMU register for repeat elections at Kiumba Beach.

i) The respondents actions are ultra vires and goes against the provisions of the Fair Administrative Actions Act 2015 and the Fisheries (Beach Management Unit) regulations 2007 which doesn't give them the powers to cancel an election of a duly election BMU Chairman.

j) That respondents are the applicants' superiors of the applicant with regard to the position of the applicant.

k) That applicant is being subjected to inhumane and unlawful treatment in terms of his relationship with the 1st respondent.

l) That applicants is about to be subjected to an illegal election without following the law by the respondents.

m) This honorable court has a duty to safeguard the rights of individuals and protect interests based on principles of fairness and equality before the law.

3. The application was opposed on the following grounds:

a) The application lacks merit and is an abuse of the court process.

b) The application is mischievous and meant to defeat the course of justice.

c) The application has not been made in good faith.

4. I have perused the affidavit of the applicant and the replying affidavit of Aguko Juma, CECM Ministry of Agriculture, Livestock and fisheries Cooperatives. These are my findings:

a) That the averment of the applicant were not challenged;

b) That there is a civil matter pending in Mbita over the same issues.

5. A Judicial Review proceedings and a civil case though stemming from the same complaint, cannot be said to be the same. The relief sought in each is different.

6. Since the respondents have not challenged what the applicant has stated, I find that the application has merit and is allowed in the following terms:

a) A declaration that the applicant is the duly elected Kiumba Beach (BMU Chairman).

b) That an order of injunction do issue against both the 1st and 2nd respondents barring the respondents whether directly by themselves or their agents from annulling the election of the applicant and calling for repeat of BMU elections at Kiumba Beach without following the due process or laid down procedure.

c) Costs of this application to be borne by the respondents.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JANUARY, 2022

KIARIE WAWERU KIARIE

JUDGE