



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC JUDICIAL REVIEW APPLICATION NO. E001 OF 2022

IN THE MATTER OF

AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF

SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF

RULE 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF

FAIR ADMONISTRATIVE ACTION ACT, 2015

BETWEEN

JOSEPH OMONDI SADIA.....1ST APPLICANT

DAVID OCHIENG MILANDO.....2ND APPLICANT

AND

RARIEDA SUB COUNTY FISHERIES ST OFFICER.....1ST RESPONDENT

CHIEF OFFICER, DEPARTMENT OF AGRICULTURE, IRRIGATION,

FOOD, LIVESTOCK & FISHERIES, SIAYA COUNTY....2ND RESPONDENT

DIRECTOR OF FISHERIES, SIAYA COUNTY.....3RD RESPONDENT

SIAYA COUNTY BMU NETWORK.....4TH RESPONDENT

RULING ON LEAVE TO APPLY FOR JUDICIAL REVIEW

1. The applicants herein Joseph Omondi Sadia and David Ochieng Milano by their application dated 1st March 2022 brought by way of

Chamber Summons seek the following orders from this court:

1. *spent*;

2. *Leave be granted for the applicants to apply for the following Judicial Review Orders:*

a. An Order of Certiorari to bring to the High Court for purposes of quashing the decision by Siaya County Chief Officer Agriculture, Irrigation, Food, Livestock and Fisheries disengaging the 2nd applicant from beach activities and the decision by the 1st Respondent suspending the 1st applicant as the Chairman of Adola BMU;

b. An order of prohibition prohibiting the 1st Respondent from in any way proceeding with the disengagement of the 1st applicant from beach activities or from his position as the chairman of Adola beach;

c. An order of prohibition prohibiting the 1st Respondent from expelling the applicants from their respective roles in the respective positions in Adola and Wik Wang BMU s respectively until they are heard and all issues ironed out;

d. That leave so granted does operate as stay against the 1st Respondent's decision suspending the 1st applicant from his role as the chairman of Adola BMU and the decision by the Siaya County Chief Officer Agriculture, Irrigation, Food, Livestock and Fisheries and Fisheries Siaya county disengaging the 2nd applicant from beach activities;

e. Costs be provided for.

f. Such further and other reliefs that the Honourable Court may deem just and expedient to grant in the interest of justice.

3. The application is premised on the grounds stated in the Applicant's statutory statement dated 1st March, 2022 and a verifying affidavit sworn on the same date by Joseph Omondi Sadia on his own behalf and on behalf of the second Applicant David Ochieng Milando.

4. The applicants' case is that vide a letter dated 5th August, 2021 the 1st Respondent suspended the applicants from engaging in activities of their respective Beach Management Units as Chairmen, citing illegal fishing practices. Copy of the said suspension letter is annexed.

5. Vide letter dated 15th August 202, the applicants wrote back to the 1st Respondent seeking clarification of the suspension which letter was not responded to.

6. On 3rd September 2021, the 1st applicant deponent wrote another letter to the Siaya County Assembly Committee of Agriculture, Livestock, Fisheries and Irrigation seeking justice over his suspension, which letter he alleges was not responded to. The letter is annexed.

7. Thereafter, the applicants through their advocate wrote a demand letter seeking for reinstatement and that on 3rd January 2022, the 2nd applicant received from the respondents a letter of disengagement from the Beach management Unit activities, which letter is also annexed.

8. It is averred that Section 4 of the Fair Administrative Action Act guarantees the applicants the right to a fair, efficient, lawful, reasonable and procedural administrative action. Further, that the Respondents failed and or ignored to hear the applicants in relation to the allegations levelled against them and that the Respondents ignored to comply with mandatory and material procedures and or conditions prescribed in taking the impugned decision.

9. According to the applicants, the Respondents committed an illegality when they suspended the applicants from their respective positions without proffering any reasons or according the applicants an opportunity to be heard contrary to section 21 of the Fisheries (Beach Management Unit) Regulations, 2007; further, that the failure to give reasons for the suspension offended Article 47 of the Constitution; and that the Respondents merely claimed that the applicants' respective BMUs were not properly registered contrary to the available documentation on registration.

10. Opposing the application for leave, the Respondents filed a replying affidavit sworn by Mr. Charles Siso the Chief Officer- holder of the 2nd Respondent office. In his affidavit, Mr. Siso deposes that the application beforehand is premature in that the applicants have not exhausted all the mechanisms/ remedies available in law for the resolution of the dispute hence they are in violation of the exhaustion doctrine as provided in law.

11. It was deposed that the application for leave offends section 9(2) of the Fair Administrative Action Act which requires exhaustion of all appeal or review mechanisms before invoking Judicial Review jurisdiction of this court. That the applicants should have filed an appeal before the Director in Charge of Fisheries as stipulated in Regulation 21 of the Fisheries (Beach management Unit) Regulations, 2007.

12. That there is no evidence that the applicants have exhausted the available appeal or review mechanisms before approaching this court.

13. That the positions that the applicants occupy are non-remunerative hence there is no reason why they desperately want to keep the positions unprocedurally.

14. The application was heard orally with the parties' counsel submitting on behalf of their respective clients, while adopting their pleadings

and affidavits on record and reiterating the matters pleaded and deposed, and which I need not reproduce here.

The Determination

15. I have considered the application dated 1st March, 2022 and the grounds in support as contained in the Statutory Statement and verifying affidavit. I have also considered the replying affidavit opposing the application and the oral submissions for and against the application.

16. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders of prohibition, mandamus or certiorari shall be made unless leave therefor has been granted in accordance with this rule. The reason for leave of court to be sought and obtained first was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

17. Thus, in an application for leave to apply for judicial review orders as is the case here, the Court ought not to delve deep into the arguments of the parties on the merits of the intended application, but should peruse the material placed before the Court and make the decision as to whether an applicant’s case is arguable to justify the grant of leave.

18. In the present application, the Applicants have annexed copies of letters suspending /disengaging them from beach activities and or being Chairmen of their respective BMUs. The letters are dated 5/8/2021 written by the Rarieda Ag Sub County Fisheries Officer addressed to the 1st Applicant Joseph Omondi Sadia suspending him from being Chairman of Adola BMU on account of engaging/ condoning proscribed fishing activities and asking him to hand over the office to the Vice Chairman until further Notice. On the same day, the 2nd Applicant received a similar letter written by the same author for the same reasons. The suspensions are stated to be pursuant to Part IV Section 21(1) of the BMU Regulations, 2007.

19. Following the above letters of suspension, the 1st applicant vide a letter dated 15/9/2021 wrote to the Siaya County Assembly Committee on Agriculture, Livestock, Fisheries and Irrigation lamenting about his suspension and seeking for intervention in the matter and claiming that the position he held had already been filled through another election held on 2nd September, 2021.

20. Vide a demand letter dated 18th November, 2021, the Advocates for the applicants wrote to the Sub County Fisheries Officer Rarieda Sub County- the 1st Respondent herein lamenting over the alleged unfair suspension of the applicants without according them a hearing. The letters are copied to the Chief Officer, Agriculture, Livestock Siaya County, County Director, Siaya County, DCC, Siaya and Siaya County BMU Networks.

21. As correctly contended by the Respondents, in applications for leave to file for judicial Review, the Court is not expected to delve deep into the substance of the intended motion but to determine whether the application as intended is frivolous hence the leave application is to seave out those frivolous applications.

22. In this case, and having read the replying affidavit sworn by the 2nd Respondent who is the Chief Officer in the office of the 2nd Respondent, I observe that the 2nd Respondent is Senior to the 3rd Respondent Director of Fisheries and therefore the question I must ask myself is whether a decision made by the 1st Respondent is appealable before the 3rd Respondent Director of Fisheries Siaya County as submitted by Mr. Okanda as per Regulation 21(1) of the BMU Regulations, or to the 2nd Respondent Chief Officer.

23. I further observe that the BMU Regulations cited are the 2007 Regulations which were enacted before the 2010 Constitution and even before the offices of 1st and 2nd Respondents were created under the Devolved system of Government and for that reason, what is contained in that Regulation must be read in line with the provisions of the Sixth Schedule of the Transitional and Consequential Provisions of the Constitution of Kenya 2010, specifically section 7 of the said Schedule which provides that:

“(1) All laws in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring into conformity with this Constitution.

(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or

public officer, the provisions of this Constitution prevail to the extent of the conflict.”

24. Having considered the above provisions, whereas I agree with Mr. Okanda advocate that section 9(2) of the Fair Administrative Action Act, which Act implements Article 47 of the Constitution requires that available alternative remedies must be exhausted before resorting to this court, and whereas those arguments are also guided by Article 159 of the Constitution which stipulates that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3”

25. I am however not satisfied that this is a clear cut case where this Court can invoke those provisions of section 9(2) of the Fair Administrative Action Act summarily without according the applicants an opportunity to be heard substantively in ventilating their grievances, in view of the fact that although the decisions of the 1st Respondent are appealable to the 3rd Respondent according to the BMU Regulations, there is communication from the 2nd Respondent Chief Officer disengaging the applicants from the BMU. It is therefore not clear whether the 2nd Respondent was acting in the place of the 3rd respondent or otherwise. These are issues which this court would be seized of to determine in a substantive motion.

26. For the above reasons, I find that the application for leave to apply is not frivolous. It is arguable.

27. On whether leave granted should operate as stay of the decisions to suspend or disengage the applicants from the activities of the BMU, Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

28. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review.

29. The main factor to consider in granting stay is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** stated:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...”

30. In the instant case, I observe that elections took place immediately the applicants were suspended and the applicants were replaced. That being the case, this court cannot stay that which is non-existent as the orders of stay would be in vain since the positions from which the applicants were suspended are elective. Stay cannot, therefore, issue in a vacuum.

31. I must however mention that the pleadings in this matter were poorly drafted in that although both applicants seem to be seeking the same orders, the prayer No.2(a) only mentions the 1st applicant. I have read the prayer No. 2(a) as a whole and that is exactly what I decipher, yet the purpose of the application was to seek remedies by both the applicants. In the interest of justice, I shall deem the 2nd applicant as having sought the same prayers as the letters suspending them and the subsequent actions by the Chief Officer affects both of them.

32. For all the above reasons, I allow the application dated 1/3/2022 partially and make the following orders:

(a) I grant leave to the applicants to institute judicial Review Proceedings in terms of prayer No. 2(a) of the Chamber Summons dated 1/3/2022 to apply for an order of Certiorari removing to this Court for purposes of being quashed, the decision by Siaya County Chief Officer Agriculture, Irrigation, Food, Livestock and Fisheries disengaging the applicants from beach activities and the decision by the 1st Respondent suspending the applicants as the Chairman of Adola and Wik Wang BMUs respectively;

(b) The substantive motion shall be filed and served within seven (7) Days of this Ruling;

a) Prayers 2(b) and (c) of the Chamber Summons are overtaken by events as the applicants have already been disengaged from the activities of their respective BMUs and as their respective positions as Chairmen of Adola MBU and Wik Wang MBU have been filled with other elected officials. Accordingly, the prayer for stay is declined;

b) Mention on 4/4/2022 to confirm the filing of the main motion and for directions on how to proceed;

c) Costs shall be in the main motion.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF MARCH, 2022

R.E. ABURILI

JUDGE