



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO 26 OF 2010

IN THE MATTER OF:

AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF:

BEACH MANAGEMENT UNIT ELECTIONS LAMU

AND

IN THE MATTER OF:

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND**

MANDAMUS AGAINST THE DISTRICT FISHERIES OFFICER MALINDI

IN THE MATTER OF:

IN THE MATTER OF BEACH MANAGEMENT UNIT ELECTIONS

BETWEEN

THE REPUBLIC

AND

**THE DISTRICT FISHERIES OFFICER MALINDI.....1ST
RESPONDENT**

**MR OMAR MSHAM ISMAEL.....2ND
RESPONDENT**

EX-PARTE

1. LARI BAHERO

SHEE

RULING

The Notice of Motion dated 1st December 2010 is made under Order LIII Rule 3 Civil Procedure Act and seeks for orders of ;-

1. Mandamus to issue compelling the 2nd and 3rd Respondents(i.e District Fisheries Officer Malindi) and MR OMAR MSHAM ISMAIL, to cause their decision of 29th October 2010 declaring OMAR MISHAM ISMAIL as duly elected Chairman of Beach Management Unit Ngomeni, Magarini for quashing and that fresh elections be held as per the Constitution.
2. An order of certiorari do issue to quash the said decision of 29th October 2010 made by the District Fisheries Officer, Malindi.
3. The alleged decision was only meant to deprive the applicants their right to participate in elections and elect their own Chairman as per the Constitution of the Unit.
4. The application is based on grounds that;-
 - (a) The applicants are members of NGOMENI – MAGARINI BEACH MANAGEMENT UNIT (refer to as Unit)
 - (b) The 1st respondent has declared the 2nd Respondent as the duly elected Chairman of the Unit without any election being held.
 - (c) The applicants have been denied their right to participate in an election to choose their chairman.
 - (d) The character of the 2nd respondent is questionable and does not qualify to be elected Chairman.
 - (e) The declaration by the 1st Respondent that the 2nd Respondent is the duly elected Chairman of the unit has greatly affected the smooth running of the unit.

In the statement of the applicants **LALI BAHERO SHEE** and **PAUL THOYA IHA**, they state that 1st Respondent has illegally declared the 2nd Respondent Chairman of the UNIT without an election taking place which actions are illegal and are an abuse of office.

The 2nd respondent`s character is questionable since he has not been remorseful for criminal activities he was involved in, and the Unit`s Constitution does not allow people of his integrity and reputation to be elected into any elective position. Elections which were intended to be held on 29/10/10 were postponed by the 1st respondent because no notice for the elections had been issued. The members demanded for more time to acquire fisheries licences but the 1st respondent denied them the chance and without cogent reasons, declared the 2nd respondent as the elected Chairman. Attempts by members to get intervention of the District Administration and police force bore no fruit.

In an odd twist the 2nd respondent disowns the application saying he is not aware of the same nor had he instructed **HEZRON GEKONDE & CO. ADVOCATES** to act on his behalf. He also denied having talked to the 1st Respondent or given his consent for swearing and signing of any authority on his behalf. He further states that at no time has he sought for orders of certiorari and mandamus against the District Fisheries Officer Malindi or **MR OMAR MSHAM ISMAEL** or the Unit, saying in any event he is a member of Ngomeni Beach Management Unit No.279 Magarini, Kilifi County and not the Beach

Management Unit in Lamu.

The application is opposed in a replying affidavit sworn by OMAR MSHAM ISMAEL he states that the application contravenes the enabling provision of the law, and the prayers sought are incapable of being granted or executed. He depones that he was elected Chair of the Unit in accordance with the relevant law i.e The Fisheries (Beach Management Unit) Regulations 2007 and is a bona fide member No.206 of the said Unit having paid for his licence and membership subscription. He also attached a list of members.

In the year 2001 he was convicted in **Cr c No.397 of 2001 R V OMAR MSHAM ISMAEL** for a charge of unnatural offence contrary to section 162 (b) of the Penal Code. He appealed against the same and was acquitted in High Court Criminal Appeal NO. 69 of 2002(Mombasa). (The copy of judgement is attached). Prior to 29/10/10, he had served as chair of the Unit for a term of 4 years and was eligible for re-election so when positions were declared vacant on 16/09/10, and members united to vie for positions, he took up the opportunity. The rules require that a person who wishes to vie for the position of chair ought to have been a bona fide member for a period of not less than 1 year and be nominated by 2 people and the nomination be supported by 10 people – this duly took place as per nomination forms and return forms annexed as M5 and M5B. The members were advised to return the Nomination forms to the Returning Officer (i.e 1st Respondent) not later than 23/09/10 so that on 29/10/10, the election date would be announced. The 1st Exparte applicant was not a bonafide member of the Unit and failed to return his nomination form to the Returning officer as at 23/9/10 – meaning that by 29/10/10, the 2nd Respondent was the only candidate duly nominated for the position of Chair – a copy of the minutes of the meeting is annexed as OM6. Being the only candidate validly nominated for the position of chair, the Returning Officer had no option but to declare him unopposed as the chair of the Unit.

The application was disposed of by way of written submissions. **MR GEKONDE** submitted that no elections were ever held and no election date was given by the 1st Respondent as per regulations governing the Unit. Further that since 1st Respondent did not file any documents in response to the application then 2nd Respondent cannot contest the applicant`s claim because the decision to declare him elected unopposed was made solely by the 1st Respondent.

Further that no notice was given for the meeting held on 16/09/10 and 29/10/10 was not a day for elections – that was a day for receiving the various nomination forms for the various positions and the return of the nomination papers was not enough evidence to enable 1st Respondent to declare one an elected official unopposed. **MR GEKONDE** insists that 2nd exparte applicant instructed him and has never formally approached his office to withdraw instruction. The unit has 106 members yet on 29th October only 89 members attend.

MR GEKONDE also drew this court`s attention to another affidavit sworn by the 2nd applicant which is dated 28th March 2011 and which he depones that he has as a matter of fact instructed **MR GEKONDE** to act in this matter and that he had been threatened by the 1st Respondent and his supporters to sign the affidavit disowning this suit and he now disowns that affidavit as he is desirous of pursuing this application. Further 1st applicant is a member of the Unit as 2nd respondent even acknowledged that he collected the members forms and was issued with an official receipt.

It is also argued that an appeal being successfully prosecuted does not mean one is of good conduct and what 2nd respondent ought to have done is to annexe a certificate of good conduct from CID(Criminal Investigation Department) to prove that he is of good conduct.

The 2nd Respondent`s counsel has submitted that the issues for determination are;-

1. Whether the application is incompetent and bad in law

2. Whether the reliefs sought are capable of being granted
3. Whether the election of the 2nd Respondent was conducted in accordance with the Provisions of the relevant laws governing the election of the Executive Committee members of a Beach Management Unit.

MR SHUJAA submits on behalf of the 2nd Respondent that no leave was granted to the exparte applicant on 5/11/10 to commence Judicial Review proceedings and the leave granted on 5/11/10 was pursuant to the Chamber Summons dated 4/11/10 which was for leave in relation to the election of the 2nd Respondent as Chairman of Lamu Beach Management Unit and that is the title of the application dated 6th April 2011 – relating to Lamu Beach Management Unit elections.

The amendments made by an application dated 2nd December 2010 is criticised as not capable of curing the anomaly/errors in the application and the only option left is to withdraw the application and give fresh Judicial Review application. The rationale is that leave granted on 5th November 2010 cannot be transferred to the amended application. I doubt that this is a tenable argument, the nature of the prayers remain the same and the error was only in the word LAMU. It is true that the Title of the application even after amendment reads LAMU, but the body and content relates to Ngomeni, the arguments and documents produced relate to Ngomeni and it is clear that even the parties refer to events surrounding activities at the Ngomeni Unit and not Lamu Unit and that none of them was misled by this anomaly. It is not sufficient reason to reject the application. To require that applicant`s file a fresh application will only go to cause delay in the matter and infact hamper fair administration of justice. This is a technical objection which should not be used to derail the application. I am guided by order 8 rule 5.

MR SHUJAA also submits that the 1st exparte applicant did not obtain the authority and consent of the 2nd exparte application and he relies on the affidavit sworn by the 2nd exparte application dated 15/11/10. However this is dented by another affidavit dated 28/03/11 sworn by the 2nd exparte applicant explaining that he had been threatened to sign that affidavit and he has disowned it – this then means that the authority obtained as stated by 1st applicant holds.

The membership of 1st exparte applicant contested on the basis that although he is listed as having collected the nomination forms, he is not listed as a member and there are no receipts annexed to demonstrate payment of membership or subscription fees and that 1st exparte applicant does not have sufficient interest in the reliefs prayed for as to entitle him to institute the proceedings.

Certainly collection of the nomination forms does not constitute proof of membership. The annexed copy of the Unit`s Constitution marked LBS 3 is incomplete as it starts at page 11, as it is not clear what the requirements for membership constitute. However the list of persons who attended the meeting on 29-10-10 shows one **IBRAHIM LALI BAHERO** as No. 81. (A list of those who attended the meeting of 16/9/ shows the name listed is **LALI BAHERO** – it is not clear whether **IBRAHIM LALI BAHERO** and **LALI BAHERO** are one and the same person. It is also not clear whether the list of 16/09/10 comprised members or just persons attending. To resolve this issue I will just pose one question – would a person who is not a member be allowed to collect nomination papers for election posts within the UNIT – that alone makes it probable that 1st exparte applicant is a member. There is nothing on the list attached to show that it is a membership list or attendance of some meeting – it is just a list with names identification cards, licence numbers and some names bearing membership members and some without. It`s only not clear even when it was generated. It is also argued that the Exparte applicant did not lodge a copy of the 1st Respondent`s decision of 29th October 2010 declaring the 2nd Respondent validly elected unopposed and that this violates Order 53 Rule 7 (1) and therefore makes the application incompetent. Rule 7 (1) provides that;-

“In the case of an application for an order of certiorari to remove any proceedings for the purpose of them being quashed, the applicant shall not question the validity of any order or warrant inquisition or

record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court.”

I confirm that the contested decision is not annexed as required and this indeed renders the application incurably defective as the provision uses mandatory terms and on this account alone, the application must fail and is dismissed with costs to the 2nd respondent.

DELIVERED AND DATED THIS 20TH DAY OF JULY 2011 AT MALINDI

**H A OMONDI
JUDGE**

Mr Shujaa present for 2nd respondent