



**Sadia & another v Rarieda Sub County Fisheries Officer & 3 others (Constitutional  
Petition E005 of 2022) [2023] KEHC 4105 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CONSTITUTIONAL PETITION E005 OF 2022**

**DO OGEMBO, J**

**MAY 2, 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,**

**BETWEEN**

**JOSEPH OMONDI SADIA ..... 1<sup>ST</sup> PETITIONER**

**DAVID OCHIENG MILANDO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**RARIEDA SUB COUNTY FISHERIES OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, DEPARTMENT OF AGRICULTURE, IRRIGATION, FOOD,  
LIVESTOCK AND FISHERIES, SIAYA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF FISHERIES, SIAYA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**BMU NETWORK CHAIRMAN, RARIEDA SUB COUNTY .. 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The 2 Petitioners Joseph Omondi Sadia and David Ochieng Milando filed a petition herein dated 26-9-2022 against the 4 named Respondents, Rarieda Sub County Fisheries Officer, Chief Officer, Department of Agriculture, Irrigation, Food, Livestock and Fisheries, Siaya County, Director of Fisheries, Siaya County and BMU Network Chairman, Rarieda Sub-County. The Petition seeks the following orders of declaration:
  - i. That the process of removal from office of the 1<sup>st</sup> Petitioner as Chairman of the Adalo Beach Management Unit, was a violation of Articles 10, 35, 47 and 50 of the [Constitution of Kenya](#), the Fair Administrative Actions Act as well as Fisheries (Beach Management Unit) Regulations, 2007 and therefore a nullity.
  - ii. That the process of removal from office of the 2<sup>nd</sup> Petitioner as the Chairman of the Wikwang Beach Management Unit, was a violation of Articles 10, 35, 47 and 50 of the [Constitution of Kenya](#), the [Fair Administrative Actions Act](#) as well as [Fisheries \(Beach Management Unit\) Regulations, 2007](#) and therefore a nullity.
  - iii. An order of the compensation for both Petitioners for the total sum of the honoraria last due to their unlawful ouster.
  - iv. General damages for violation of the Petitioners' constitutional rights.
  - v. Costs of the petition.
2. The Petition is supported by the Affidavit of the 1<sup>st</sup> Petitioner sworn on 26-9-2022. The Petition is opposed by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents. The same was canvassed by way of written submissions which both sides duly filed.
3. Mr. Osur for the petitioners submitted that on 5-8-2021, the 1st Petitioner duly elected Chairman of Adalo Beach Management Unit received a letter of suspension from 1<sup>st</sup> Respondent, the allegations being engaging in or condoning prescribed fishing practices. That in violation of Article 47 and 50, he was not informed of the specific prescribed fishing practices, neither was he given the opportunity to respond to the allegations. That he was entitled to the rights to be heard and to fair hearing (Articles 47, 50). That he sought reproach by letter dated 11-8-2021 under Section 21(3) of the [Fisheries \(Beach Management Unit\) Regulations](#), which letter was never responded to. That on 2-9-2021, while 1<sup>st</sup> Petitioner was on suspension, the 2<sup>nd</sup> Respondent conducted elections and replaced him, making him plead to the 3<sup>rd</sup> Respondent. His advocate also wrote demanding his reinstatement, but 1<sup>st</sup> Respondent in a letter dated 29-11-2021 upheld his suspension, adding that Adalo was not a properly registered beach management unit. That the suspensions and dismissal of the 1<sup>st</sup> Petitioner was malicious and deceitful. He gave upto 8 reasons why he held so. The position was the same with regard to the 2<sup>nd</sup> Petitioners, now of Wikwang Beach Management Unit.
4. Counsel submitted further, that under Section 20 and 21 (6) of the Beach Management Unit, an Executive Officer may only be dismissed by the assembly through a secret ballot conducted as per Section 20 of the Act, and that removal in any other way is unknown in law. That the action of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were therefore ultra vires, in breach of Section 20 and 21 of the [Fisheries \(Beach Management Unit\) Regulations, 2007](#), The Fair Administrative Act and the [Constitution](#).



5. On whether this matter ought to have been filed the Commission on Administrative Justice, counsel relied on in *Katiba Institute v President's Delivery Unit and 3 Others* [2017]eKLR, that this court has unlimited jurisdiction under Article 165(3)(b) of the Constitution to determine the question whether a right or fundamental freedoms in the Bill of Rights has been denied, violated, infringed or threatened. That the court therein held that the Respondents' contention that the petition is premature and is therefore unsustainable.
6. That the Commission has jurisdiction to handle only matters regarding the violation of rights under Article 35, and not the other claims of Petitioner, the unprocedural removal from office and discrimination and violation of their rights.
7. Counsel conceded that courts have often directed parties claiming under Article 35 of the Constitution to first approach the commission as established under the Access to Information Act as submitted by the Respondent, but that the ratio of any decision must be understood in the backyard of the facts of a particular case (*Bwire v Ways and Sailoki* [2022] KEHC7 (KLR)).
8. That the claim of the petitioners is not only their right to information and the court is to determine whether the commission has jurisdiction to determine the violations.
9. Counsel also relied on the case of *R v IEBC, ex parte NASA Kenya and 6 Others* [2017]eKLR , that the doctrine of exhaustion has exemption i.e. where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. On the same vein, counsel also relied on *Night Rose Cosmetics [1972] Ltd v Nairobi County Government and 2 Others* [2018]eKLR.
10. And on the submissions that the Petitioners ought to have appealed to the Director of Fisheries, the Petitioners maintained that they indeed appealed vide letters dated 9<sup>th</sup> and August 10, 2021 (JOS-14). That equity looks at intention rather than form. That being mere fishermen, petitioners may not have known on how to frame their appeal.
11. On whether this matter ought to have been filed at the Employment and Labour Relations Court, it was submitted that the jurisdiction of that court is confined to matters falling within Article 41 of the Constitution as read with Section 12 of the Employment and Labour Relations Court, and not petitions outside the aforesaid matters. That where the matters raised fall both within the ELRC's jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction.
12. That the matters raised herein are not purely employment matters, but also issues of violation and interpretation of the Constitution.
13. It was argued that should the court find it has no jurisdiction herein, it should transfer this case to the ELRC court rather than dismiss the same in line with the case of *Allan Mupe Bakari v Diani Sea Lodge* [2020]eKLR, the court should safeguard the right to access to justice and that a mistake or blunder should not be the only reason to shut the doors of justice to citizens of this country.
14. Also TSS Investments and Another v NIC Bank Ltd [2019]eKLR, where the ELC Court on its own motion transferred the matter to the High Court. Other cases relied on were *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board and 9 Others* [2015]eKLR, and *Professor Daniel N. Mugendi Vs Kenyatta University and 6 Others*, CA No. 6/2012, a case in which the Court of Appeal affirmed that where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination and that the 3 courts should in the spirit of harmonization, effect necessary transfers amongst themselves.



15. Mr. Okanda for 1<sup>st</sup>/2<sup>nd</sup> and 3<sup>rd</sup> Respondents, on the other hand, submitted that the first issue for determination is whether this petition has been filed prematurely. That [Access to Information Act](#), 2016 is the law that gives effect to Article 35 of the [Constitution](#) and to which recourse must be sought should a claim be made on violation of that right such as herein. That Section 14 of the Act grants the Commission on Administrative Justice, original jurisdiction for review of decision of public bodies relating to access to information.
16. It was further submitted that the petitioners have not exhausted statutorily available remedies against the actions of an administrative or public body before invoking the jurisdiction of the courts. That the petitioners claim is that Respondents have refused to furnish them with the listed documents which matter falls squarely under Section 14(1) of the [Access to Information Act](#), within the province of the Commission on Administrative Justice in the first instance. That under the said provision, a party seeking the assistance of court on claim for violation of Article 35(1) right must first demonstrate that;
  - a. The information is in the custody or possession of the public body.
  - b. That they have requested for the said information from the said public body and their request declined.
  - c. That they have invoked the jurisdiction of the Commission on Administrative Justice as provided under the [Access to Information Act](#).
17. Counsel referred this court to the Court of Appeal decision in [Geoffrey Muthinja and Another v Samuel Muguna Henry and 1756 Others](#) [2015]eKLR , where it was held that where there is a dispute resolution mechanism outside courts, the same be exhausted before the jurisdiction of the courts can be invoked. That courts ought to be force for last resort and not the first part of call the moment a storm brew.
18. In the case, the court emphasized the importance of exhaustion doctrine as being in accord with Article 159 of the [Constitution](#) which commands court to encourage alternative means of dispute resolution.
19. Further submissions were made based on [Speaker of the National Assembly v James Njenga Karume](#) [1992]eKLR in which the Court of Appeal held;

“.....where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure must be strictly followed.”
20. Lastly, the Respondents referred to the case of [Charles Obure and Another -Vs- Clerk, County Assembly of Siaya and Another](#) [2020]eKLR , in which Justice Aburili, dismissed a similar petition on the basis that the matters raised were not ripe for determination by the court going by the principle of exhaustion of remedies.
21. The court was urged to find this petition premature, unfounded and incompetent and dismiss the same.
22. That Fisheries (Beach Management Unit) Regulations, 2007, requires that an appeal ought first be to the Director and there is no evidence that the Petitioners have exhausted this avenue.
23. The Respondents have also raised the issue of jurisdiction. That this petition ought to lie with the Employment and Labour Relations Court which has jurisdiction to hear and determine all disputes relating to employment. The case of [Christine Adot Lopeyio -Vs- Wycliffe Mwachhi](#) [2013]eKLR was relied on as what constitutes employment. That the Petitioners were agents of the County Government



and subject to the rules and procedures prescribed by the county government. That this court is not the right forum for this petition.

24. I have considered this petition of the 2 Petitioners and the Affidavits filed both in support of the same and those in opposing the petition. I have also considered the 2 rival submissions filed by the 2 sides and the various decisions of the superior courts relied on by the parties. The cases of the 2 petitioners are similar in all material respects. That they were elected chairman of their respective Beach Management Units (Adalo and Wikwang BMU) with payable honoraria for kilograms of fish caught in a day.
25. That by way of written letters, the 1<sup>st</sup> Respondent suspected the petitioners from their positions as Chairmen on grounds of condoning prescribed fishing practices. That the petitioners were never informed of the specific prescribed fishing practices. That Article 50 of the Constitution guarantees the right to fair hearing including the right to access to information. That the said suspension letters illegal, ambiguous and a violation of the law. That the 2<sup>nd</sup> Respondent, while the Petitioners are still on suspension, gone ahead and conducted elections replacing the 2 Petitioners vide their application dated 26-9-2022, the petitioners have sought from the Respondent various pieces of information including minutes of various meetings, letters, investigation report, and also inquiry reports. The petitioners have therefore sought for orders of declarations that the process of their removal from office was illegal and a nullity. They have also prayed for orders of compensation, general damages and cost of this petition.
26. The response of the Respondents to this petition has been in the form of an objection seeking that this petition be dismissed. In fact, the Respondents opposed this petition by submitting on the Notice of Preliminary Objection earlier filed herein and dated December 19, 2022. As seen above, the objections are basically on 2 main grounds. First, that the petitioners have not exhausted all remedies available in law for the resolution of the dispute before invoking the jurisdiction of the court and hence violating the exhaustion doctrine. And secondly, that this court lacks the jurisdiction to entertain this petition as the matters raised therein fall within the Employment and Labour Relations Court.
27. The Respondents have raised the issue of jurisdiction. That is, whether this court, has jurisdiction to entertain this matter. It is imperative therefore, that we deal with this issue before the court can move on to the substantive issues raised in the petition. I get guidance on this from the Court of Appeal decision in the case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989]eKLR, which the court gave directions on the issue of jurisdiction, thus;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
28. In our present case, it is not disputed that upon being elected the officials of the Beach Management Units become responsible both to the electorates and to the county Government through the Department of Agriculture, Irrigation, Food, Livestock and Fisheries, and that the Fisheries (Beach Management Unit) Regulations, 2007 gives the Director the power to exercise disciplinary control over the elected officials. The Petitioners were even entitled to honoraria. The Director could suspend the officials. His powers even extended to organizing for elections. The relationship between the parties was therefore one of the employment, a fact that has been conceded by the petitioners in their submissions.
29. In the case of County Assembly of Kisumu and 2 Others v Kisumu County Assembly Service Board & 6 Others [2015]eKLR, cited by the petitioners, the Court of Appeal confirmed that under Article 162 of the Constitution, the Employment and Labour Relations Court has the status of the High Court



and that it follows that that court has supervisory powers over any person, body or authority exercising judicial or quasi-judicial functions.

30. With the concession by the Petitioners that this cause of action herein being of the genre of employment, I find that this court lacks the requisite, jurisdiction to entertain or determine this petition, a jurisdiction that lies with the Employment and Labour Relations Court.

31. The Petitioners have pleaded that in the event that this court finds that it lacks jurisdiction over this matter, then the court rather than dismiss the petition, ought to transfer the matter to the appropriate court so that the ends of justice are met (*Allan Mupe Bakari v Diani Sea Lodge* [2020]eKLR). Whereas I find much substance in these submissions, it appears to me that this approach has been adopted by the courts as stop gap measure towards the realization of harmonization of the roles and jurisdiction of the High Court, the Environment and Land Court, and the Employment and Labour Relations Court. The Court of Appeal in *Prof. Daniel N. Mugendi v Kenyatta University and 3 Others*, Civil Appeal No. 6 of 2012, dealing with the same issue, put a rider in holding that:

“And in order to do justice, in the event where the High Court, the Industrial Court or the Environmental and Land Court comes across a matter that ought to be litigated in any of the others courts, it should be prudent to have the matter transferred to that court for hearing and determination until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”

32. In the same case, the court held that the labour court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the court frowned on the fact that the trial judge had determined certain issues therein even after making a finding that it had no jurisdiction over the same.

33. I have no doubt in my mind that since the establishment of the Employment and Labour Relations court under Article 162(2) of the *Constitution* [2010] and the operationalization of the same vide the *Employment and Labour Relations Court Act*, No. 20 of 2011, the jurisdictions of the 3 courts of equal status are well established and are well known to litigants and advocates. If the transfer of cases between the 3 courts were to be tolerated to ensure harmonization, then the same cannot be applicable so many years down the line. It is for this reason that I do not find merit in the Plea by the petitioners that an order do issue transferring this petition to the relevant and appropriate court for trial and determination. I decline the prayer.

34. This court has already made a determination that it lacks the jurisdiction to entertain the matter. I will therefore not venture into the merits or not of the substantive claims in this petition which the petitioners may very well pursue in appropriate fora. The net effect is that this petition of the petitioners dated September 26, 2022 is dismissed. The Petitioners will pay the cost of this petition.

Orders accordingly

**JUDGMENT READ OUT IN COURT THIS 2<sup>ND</sup> MAY, 2023.**

**HON. D. O. OGEMBO**

**JUDGE**

**Court:**

Judgment read out in court in the presence of Mr. Okanda for Respondents and in the absence of Mr. Osur for Petitioners, though served.

Both parties are present.



**HON. D. O. OGEMBO**

**JUDGE**

**MAY 2, 2023**

